SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Miscellaneous

Page

Publication

Statutes

Textbooks

IN THE

Supreme Court of the United States

October Term, 1972
No. 71-1637

THE CITY OF BURBANK, a municipal corporation; DR. JARVEY GILBERT, Mayor; ROBERT R. McKENZIE, Vice Mayor; Councilman GEORGE W. HAVEN; Councilman ROBERT A. SWANSON; Councilman D. VERNER GIBSON; JOSEPH N. BAKER, City Manager; SAMUEL GORLICK, City Attorney for the City of Burbank and REX R. ANDREWS, Chief of Police of the City of Burbank,

Appellants,

vs.

LOCKHEED AIR TERMINAL, INC., a corporation, PACIFIC SOUTHWEST AIR LINES, a corporation, and AIR TRANSPORT ASSOCIATION OF AMERICA,

Appellees.

On Appeal From the United States Court of Appeals for the Ninth Circuit.

BRIEF OF THE APPELLANTS.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Ninth Circuit is reported in 457 F. 2d 667 and is included in the Appendix (A. 410). The opinion of the United States District Court for the Central District of California is reported in 318 F. Supp. 914 and is included in the Appendix (A. 341).

JURISDICTION.

The judgment of the United States Court of Appeals was entered on March 22, 1972 (A. 5, 428). Notice of Appeal to this Court was filed with the Clerk of the United States Court of Appeals for the Ninth Circuit on May 15, 1972 (A. 5). The Jurisdictional Statement was filed with the Clerk of this Court on June 17, 1972. This Court noted probable jurisdiction on October 10, 1972. Since this is an appeal from a judgment of the United States Court of Appeals which held invalid an ordinance of the City of Burbank, as repugnant to the Supremacy Clause of the Constitution of the United States (Art. VI, Clause 2), the jurisdiction of this Court rests on 28 U.S.C. §1254(2). The following decisions sustain the jurisdiction of this Court to review the judgment in this case on appeal: *United Gas Pipe Line Co. v. Ideal Cement Co.*, 369 U.S. 134, 135 (1962); *City of Detroit v. Murray Corporation of America*, 355 U.S. 489, 492 (1958); *Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66, 70 (1954); *Dutton v. Evans*, 400 U.S. 74, 77 (1970).

ORDINANCE INVOLVED.

The ordinance involved in this case is Ordinance No. 2216 of the City of Burbank passed and adopted on March 31, 1970, which added Section 20-32.1 to the Burbank Municipal Code providing as follows (A. 378):

"Sec. 20-32.1. Aircraft Take-Offs.

"(a) Pure Jets Prohibited from Taking Off Between 11:00 P.M. and 7:00 A.M.

"It shall be unlawful for any person at the controls of a pure jet aircraft to take off from the Hollywood-Burbank Airport between 11:00 P.M. of one day and 7:00 A.M. the next day.

"(b) Airport Operator Prohibited from Allowing Take-Offs.

"It shall be unlawful for the operator of the Hollywood-Burbank Airport to allow a pure jet aircraft to take off from said airport between 11:00 P.M. of one day and 7:00 A.M. the next day.

"(c) Exception: Emergencies.

"This Section shall not apply to flights of an emergency nature if the City's Police Department is contacted and the approval of the Watch Commander on duty is obtained before take-off."

CONSTITUTIONAL PROVISIONS INVOLVED.

The provisions of the Constitution of the United States involved in this case are as follows:

(1) The Supremacy Clause (Art. VI, Clause 2) which provides:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

(2) The Commerce Clause (Art. I, Section 8, Clause 3), which provides:

["The Congress shall have power . . ."]

"To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

(3) That portion of the Fifth Amendment which provides:

". . . nor shall [any person] be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

(4) The Ninth Amendment which provides:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

(5) The Tenth Amendment which provides:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

QUESTIONS PRESENTED.

The questions presented for review are as follows (A. 55, 342):

(1) Whether the Federal government has so preempted the fields of regulation of the use of air space and the regulation of air traffic so as to invalidate and preclude enforcement of the ordinance (Supremacy Clause, Article VI, Clause 2).

(2) Whether the ordinance is in conflict with Federal statutes or Federal regulations and is rendered void and unenforceable by the Supremacy Clause (Article VI, Clause 2).

(3) Whether enforcement of the ordinance would result in an intolerable and unreasonable burden on interstate commerce in violation of the Commerce Clause (Article I, Section 8, Clause 3).

(4) Whether the ordinance constitutes an attempted regulation of a phase of the national commerce which, because of the need of national uniformity, demands that regulation, if any, be prescribed by a single authority.

In the terms and circumstances of the case the question presented for review is whether the City of Burbank is powerless to restrict departures of pure jet aircraft from Hollywood-Burbank Airport, a *privately* owned and operated airport within its boundaries, between the hours of 11:00 p.m. and 7:00 a.m. under the following circumstances:

(a) To accommodate jet aircraft the private airport proprietor (Lockheed Air Terminal, Inc.) has extended the airport runways to the maximum limits of its property so that aircraft using it must necessarily fly at low altitudes over adjacent residences, with resultant disturbance of the occupants of such residences, particularly during the hours normally devoted to sleep [Pl. Ex. 2, A. 428-429, 98; Pl. Ex. 7, A. 452-453, 103; Pl. Ex. 30, A. 453, 113].

(b) The Federal Aviation Administrator has refused to make any determinations as to what would be acceptable noise levels in terms of jet aircraft for particular airport environments and has left such deter-

minations in the hands of individual airport proprietors.[1]

(c) Airport proprietors, without violating any Federal statute or regulation, may exclude any aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory.[2]

(d) The FAA Chief of the Airport Traffic Control Tower at the Hollywood-Burbank Airport has recognized the seriousness of the noise problem in the vicinity of the airport and the steps taken by him to reduce this problem were ineffective (A. 317, 319).

(e) The Federal Aviation Administrator, under similar circumstances, has declared that nondiscriminatory time limitations may be an effective and appropriate means of adapting aircraft noise to the needs of local communities and that such form of locally responsive noise control is clearly in the national interest.[3]

(f) The only regularly scheduled flight affected by the ordinance was in intrastate flight of an intrastate air carrier (Pacific Southwest Air Lines) departing at 11:30 p.m. each Sunday (A. 394). The other flights affected were principally departures of corporate jet aircraft (A. 395).

---

[1]34 Federal Register 18355-18356, Nov. 18, 1969; now 14 C.F.R. §36.5. The pertinent portion is set out in the Appendix to this Brief at p. 3.

[2]Letter dated June 22, 1968 from the Secretary of Transportation to the Committee on Interstate Commerce contained in Senate Report No. 1353, 90th Cong. 2d Sess. 6-7 (1968). This letter is set out in full in the Appendix to this Brief at pp. 1-2. See also 34 Federal Register 18355-18356, footnote 1, *supra*; *In re Dretfus* (Appendix to this Brief at p. 11).

[3]*In re Dretfus*, FAA Regulatory Docket No. 9071 (7/10/69). The full text of the Federal Aviation Administrator's Opinion in this matter is set out in the Appendix to this Brief at pp. 4-13.

STATEMENT OF THE CASE.

1. Nature of the Case.

This is a suit brought by Lockheed Air Terminal, Inc.[4] (hereinafter referred to as "Lockheed"), a Delaware corporation, as owner and operator of the Hollywood-Burbank Airport, and by Pacific Southwest Air Lines (hereinafter referred to as "PSA"), an *intra*state air carrier[5] incorporated under the laws of the State of California, against the City of Burbank (hereinafter referred to as "Burbank") and certain of its officers, seeking declaratory and injunctive relief with respect to the ordinance referred to above (A. 6-8) and alleging that the ordinance violated the Due Process Clause (XIV Amendment), the Commerce Clause (Art. I, Sec. 8, Clause 3), the War Powers Clauses (Art. I. Sec. 8, Clauses 11-14) and the Supremacy Clause (Art. VI, Clause 2) of the Constitution of the United States (A. 15). The District Court's jurisdiction was invoked under 28 U.S.C. §1331 and 28 U.S.C. §1337 (A. 7).

Air Transport Association of America (hereinafter referred to as "ATA"), an unincorporated trade association of scheduled interstate air carriers,[6] was subsequently permitted to file a complaint in intervention seeking the same relief but only alleging that the ordinance violated the Commerce Clause (Art. I, Sec. 8,

---

[4]All of the stock of Lockheed Air Terminal, Inc. is owned by Lockheed Aircraft Corporation (A. 99,438).

[5]As an *intra*state air carrier, PSA is not subject to regulation or control by the Civil Aeronautics Board. Its fares and charges are regulated by the California Public Utilities Commission (Sec. 2751, California Public Utilities Code) and it holds a Certificate of Public Convenience and Necessity issued by that Commission (A. 383).

[6]The members of ATA include virtually all United States scheduled interstate air carriers (A. 376).

Clause 3), and the Supremacy Clause (Art. VI, Clause 2) of the United States Constitution (A. 27, 34).

Lockheed and PSA subsequently abandoned any contention that the ordinance violated the Due Process Clause (XIV Amendment) or the War Powers Clauses (Art. I, Sec. 8, Clauses 11-14) of the United States Constitution (A. 55), and withdrew these issues from the District Court's consideration (A. 66-67).

2. Course of Proceedings and Disposition.

The original complaint herein was filed on May 14, 1970 (A. 2) together with an application for a temporary restraining order and an order to show cause why a preliminary injunction against the enforcement of the ordinance pending trial should not issue [R. 421]. The application was granted and the hearing on the preliminary injunction was held on May 27, 1970 [R. 421]. At the request of Lockheed the temporary restraining order was dissolved and the hearing on the order to show cause placed off calendar as to Lockheed [R. 421]. Pursuant to stipulation between PSA and the defendants, the temporary restraining order was continued in effect so as to permit PSA to continue its 11:30 p.m. Sunday night flight from Hollywood-Burbank Airport until July 12, 1970, and PSA withdrew its application for a preliminary injunction [A. 83-84; R. 421]. As a result the ordinance became effective again on July 13, 1970 and continued in effect until November 30, 1970.

The trial took place on September 15, 16 and 17, 1970 (A. 3). On November 30, 1970 the findings of fact, conclusions of law and judgment were signed and filed and the judgment entered (A. 4). The judg

ment of the District Court declared the ordinance unconstitutional, illegal and void and enjoined its enforcement (A. 408). In reaching this conclusion the District Court held the ordinance to be repugnant to the Supremacy Clause (preemption and conflict) and to the Commerce Clause (A. 405).

The Court of Appeals, in deciding the case, limited itself to the issue whether the ordinance was repugnant to the Supremacy Clause in two aspects, namely, (1) preemption and (2) conflict (A. 414). While there was unanimity on the conflict issue and affirmance of the judgment of the District Court, one of the three judges refused to concur in that portion of the opinion which dealt with the preemption issue (A. 427).

3. Relevant Facts.

Hollywood-Burbank Airport.

Hollywood-Burbank Airport is located in a thickly populated area (A. 373, 393) and entirely within the City of Burbank except approximately 2,050 feet of the northernmost portion of its "North-South" runway which lie in the City of Los Angeles (A. 380-381). The "North-South" runway is the preferential runway for take-off (from north to south), not only because of its greater length (approximately 6,900 feet), but also because of its southerly slope and the fact that the prevailing wind is generally from the south (A. 157-159). Aircraft taking off to the south over-fly a residential area within the City of Burbank from one-third to one-half mile distant (A. 336). Hollywood-Burbank Airport also has an "East-West" runway (A. 381) approximately 6,000 feet in length (A. 156). Aircraft departing to the east on this runway over-fly a residential area within the City of Burbank somewhat closer

than the residential area to the south (A. 455). Aircraft departing to the west over-fly that portion of the City of Los Angeles known as North Hollywood (A. 74). The FAA Departure Charts for Hollywood-Burbank Airport [Pl. Ex. 7, A. 452-453, 103] specify minimum climb rates for departing aircraft varying from 260 feet to 347 feet per nautical mile.

None of the runways at Hollywood-Burbank Airport can accommodate the larger jet aircraft, such as the 707 and the DC-8 (A. 141). They are generally sufficient[1] to accommodate the smaller jet aircraft such as the 727, the DC-9 and the 737 (A. 142). Lockheed achieved the runway lengths indicated by extending these runways to the limits of the property which it owns or controls [Pl. Ex. 2, A. 428-429, 98].

Hollywood-Burbank Airport is used by United Air Lines, Western, Air West and Pacific Southwest Air Lines, and now possibly by Continental Air Lines, as an alternate to Los Angeles International Airport (LAX) when landing there is precluded by weather conditions (A. 170).

United Air Lines, Western, Air West, Continental Air Lines and Pacific Southwest Air Lines also utilize Hollywood-Burbank Airport for regularly scheduled flights (A. 383).

The problem with respect to noise created by aircraft taking off or landing at Hollywood-Burbank Airport dates from about 1965 when jet aircraft began using the airport on a regular basis (A. 142). The first

---

[1] There have been instances when air carriers have had to reduce their load in order to take off, because of wind (calm) and temperature (hot) conditions (A. 323).

official recognition of the adverse environmental effects of this jet aircraft traffic was in the latter part of 1967 when the FAA Chief of the Airport Traffic Control Tower at the airport established non-mandatory procedures for take-offs and landings in an attempt to reduce noise complaints (A. 112). These procedures were modified several times, the last of which (dated September 4, 1969) provided, on a non-mandatory basis, that Runway 25 (take-offs to the west on the "East-West" runway) should be used as much as possible for departures of turbine powered aircraft during the period from 2300 to 0700 when people are asleep [Pl. Ex. 30, A. 453, 113]. The only discernible effect of this procedure was an increase in complaints by people living west of the airport (A. 317). The number of complaints from south of the airport remained about the same (A. 319).

Burbank Ordinance.

On March 31, 1970 the City Council of the City of Burbank duly and regularly adopted Ordinance No. 2216 which added Section 20-32.1 to the Burbank Municipal Code to provide as set forth above. It became effective on May 4, 1970. (A. 378). Its prohibitions were two-fold, one making it unlawful for the pilot of a pure jet aircraft to take off from the Hollywood-Burbank Airport between 11:00 p.m. of one day and 7:00 a.m. the next day, and the other making it unlawful for the operator of the Hollywood-Burbank Airport (Lockheed Air Terminal, Inc.) to allow a pure jet aircraft to take off from the airport during such periods. Flights of an emergency nature were excepted. Prior to the effective date of this ordinance, Mr. Da-

vid M. Simmons, President of Lockheed, submitted to the City of Burbank a list of what he considered to be flights of an emergency nature which would justify a jet departure during the hours proscribed [Def. Ex. A, A. 518, 179] and by letter dated May 1, 1970 [Def. Ex. A-1, A. 520, 180], Mr. Simmons was advised by the City Attorney that the list of emergency conditions appeared reasonable and would be used by the Police Department at least for the time being. He also advised that a 6:40 a.m. charter flight by Lockheed-California specialists to Palmdale each working day had been cleared as an emergency flight. Among the other departures authorized as emergency flights were aircraft scheduled for departure prior to 2300 which had been delayed by mechanical problems, weather or air traffic control procedures; aircraft which had to land because of emergency conditions; and aircraft which, because of weather conditions at the airport of their destination, had to utilize Hollywood-Burbank Airport as an alternate. The City of Burbank abided by these emergency conditions (A. 180).

The only regularly scheduled flight affected by the ordinance was an *intra*state flight of Pacific Southwest Air Lines (an *intra*state air carrier) originating in Oakland, California and departing from Hollywood-Burbank Airport at 11:30 p.m. each Sunday night for San Diego (A. 394).*

*The departure time for this flight has since been moved forward to 10:50 p.m. by PSA even though, at the time it did this, the Burbank ordinance was no longer in effect because of the District Court's injunction.

The only other flights affected by the ordinance were principally departures (at least three per week) of corporate jet aircraft (A. 395).

Federal Regulation.

Lockheed, as the proprietor and operator of the Hollywood-Burbank Airport, is not subject to Federal economic or other regulation, except in terms of the *safety* of its operation.[9] It establishes its own schedule of rates and charges for the use of the airport by air carriers and other aircraft, and such schedule is not subject to approval of the Civil Aeronautics Board, the Federal Aviation Administration or any other governmental agency or body (A. 170). Lockheed's consent must be obtained for use of its airport by an air carrier even though a Certificate of Public Convenience and Necessity issued by the Civil Aeronautics Board specifies that airport as one of the points on the route

---

[9]Section 612 (49 U.S.C. §1432), which was added to the Federal Aviation Act of 1958 in 1970, became effective on *May 21, 1972*. That section authorizes the Federal Aviation Administrator "to issue airport operating certificates to airports serving air carriers certificated by the Civil Aeronautics Board and to establish minimum *safety* standards for the operation of such airports." It further provides that "any person *desiring* to operate an airport serving air carriers certificated by the Civil Aeronautics Board *may* file with the Administrator an application for an airport operating certificate." The Administrator is required to issue an operating certificate to any airport proprietor applying therefor if he "finds, after investigation, that such person is properly and adequately equipped and able to conduct a safe operation in accordance with the requirements of this Act and the rules, regulations, and standards prescribed thereunder, . . .". Additionally he must prescribe in the operating certificate "such terms, conditions, and limitations as are reasonably necessary to assure *safety* in air transportation, . . .". (Italics added).

[Pl. Ex. 35 at p. 13, A. 118].[10] As a matter of policy, Lockheed supports route applications before the Civil Aeronautics Board or the California Public Utilities Commission which would entail the use of its facilities, to demonstrate that it is in full accord (A. 147), and has had no occasion to do otherwise because the airport has had excess capacity for a number of years (A. 168). In addition, Lockheed may exclude any aircraft on the basis of noise and impose operational regulations on the airlines using the airport (A. 171-172), including a restriction on runway use and hours of operation.[11] It may substantially reconstruct its airport or alter the runway layout without FAA approval.[12]

In sharp contrast to the foregoing and as to those who use the *navigable* airspace, Federal control and regulation is detailed and extensive. Some of the more important of these Federal controls and regulations are

---

[10]Additionally, subsection (i) of Section 401 (49 U.S.C. §1371(i)) of the Federal Aviation Act of 1958 provides that a Certificate of Public Convenience and Necessity issued by the Civil Aeronautics Board does not "confer any proprietary, property, or exclusive right in the use of any airspace, Federal airway, *landing area*, or air-navigational facility." (Italics added).

[11]*Supra*, footnote 2. See also *Port of New York Authority v. Eastern Airlines*, 259 F. Supp. 142 (1966). The issue in this case was the Port of New York Authority's right to prohibit jet aircraft from using a recently completed runway at LaGuardia Airport until the construction of a second runway was completed. The Authority wanted to avoid the concentration of jet aircraft noise which would have resulted from the use of this runway alone. The District Court supported the Authority's right to do so and granted injunctive relief.

[12]In such cases it is only required to give the Federal Aviation Administrator "reasonable prior notice thereof . . . so that he may *advise* as to the effects of such construction on the use of airspace by aircraft." (49 U.S.C. §1350).

set forth at length in the Findings of Fact of the District Court (A. 375).

As to the control and abatement of aircraft noise, Section 611 (49 U.S.C. §1431) of the Federal Aviation Act of 1958 requires and empowers the Federal Aviation Administrator to "prescribe and amend such rules and regulations as he may find necessary to provide for the control and abatement of aircraft noise." Acting under this authority, the Administrator has adopted regulations prescribing noise standards for all *new* subsonic turbojet-powered aircraft (34 Federal Register 18355-18356, Nov. 18, 1969, now published at 14 C.F.R. Part 36). However, in doing so, he stated that "The noise limits specified . . . are not intended to substitute federally determined noise levels for those more restrictive limits determined to be necessary by individual airport proprietors in response to the locally determined desire for quiet and the locally determined need for the benefits of air commerce", and further "that the Federal Aviation Administration makes no determination, under Part 36, on the acceptability of the prescribed noise levels in any specific airport environment."

In addition, the Federal Aviation Administrator has established operational regulations which require turbine powered fixed wing aircraft to maintain an altitude of at least 1,500 feet within an airport traffic area until further descent is required for a safe landing, and to climb to 1,500 feet as rapidly as practicable, when taking off (14 C.F.R. §91.87(d), (f)).

SUMMARY OF ARGUMENT.

The following is a summary of the principal points set forth and the contentions made in the Argument to follow. This summary follows the seven principal subdivisions of the Argument.

1. The Problem.

Noise pollution and, in particular, noise created by jet aircraft is affecting millions of people in this country psychologically, physiologically and sociologically. Jet aircraft noise during normal sleeping hours has a compounding impact on residents in the vicinity of airports because the noise cannot be assimilated as it is during the day with other noises. The present level of noise created by jet aircraft is indefensible and irresponsible. The Federal Aviation Administration has demonstrated complete and utter lack of willingness to provide any meaningful relief from jet aircraft noise. The net result is that airport proprietors are *not* regulated in terms of permissible level of noise which may be created by aircraft using their airports. The lower Federal Courts have likewise refused to provide such relief.

2. The Preemption Issue.

The Federal acts relating to air commerce and the exercise of Federal commerce power do not prevent State action consistent with that power where the State action or regulation is designed to protect the health or welfare of those who reside or work in a particular State or community. There is nothing in the Federal Aviation Act of 1958 (49 U.S.C. §1301, *et seq.*) which would suggest that Congress intended to preempt the regulation of airport proprietors. The

validity of a claim of Federal preemption cannot be judged by reference to broad statements about the "comprehensive" nature of Federal regulations or the "exclusive jurisdiction" of Congress. The Burbank ordinance does not impinge on an area inherently requiring national uniformity. In fact national uniformity in this area of regulation is neither desirable nor possible. The Federal Aviation Administrator himself has declared that this form of locally responsive noise control is in the "national interest" and is not incompatible with the primary reason for the Federal Aviation Act of 1958. He has set the pattern for this by imposing more severe restrictions on the use of the Washington National Airport during the late evening and early morning hours. He has further refused to make any determination as to what would be acceptable levels of noise in particular airport environments. Decisions of this Court sustain the proposition that so long as any power of the Federal Aviation Administrator remains "dormant and unexercised" States and local governments may regulate in this area. This Court has further held that State or local governmental regulations are permissible in the area where a Federally regulated enterprise has freedom to act. In this case Lockheed had the freedom and discretion to take the action necessary to exclude aircraft on the basis of noise considerations. Accordingly, the City of Burbank had the power to require Lockheed to exercise this discretion in the manner as set forth in the Burbank ordinance.

3. The Conflict Issue.

The Court of Appeals resolved the conflict issue against the Appellants by concluding that the Burbank ordinance "stands as an obstacle to accomplishment and execution of the full purposes and objectives of Congress." The conflict which it found was with respect to a *non-mandatory* runway preference order of a minor FAA official in charge of the Air Traffic Control Tower at Hollywood-Burbank Airport. It viewed the non-mandatory runway preference order as a determination by the FAA that no further steps could properly be taken to alleviate the noise pollution resulting from operations at the Hollywood-Burbank Airport. This so-called "determination" was itself in conflict with other determinations made by the Federal Aviation Administrator. The only weight that can be properly accorded to the FAA Tower Chief's determination is that of all noise abatement runway procedures he had attempted, this last one had the best prospects of achieving the greatest noise reduction. As to the effect of the Burbank ordinance on the 11:30 p.m. PSA Sunday night flight, the convenience of the persons departing on that flight as well as the convenience of those who wish to utilize corporate jet aircraft during the period proscribed by the Burbank ordinance, must be weighed against the need of thousands of persons who reside in the vicinity of the Hollywood-Burbank Airport for uninterrupted sleep. As to the Certificates of Public Convenience and Necessity issued by the Civil Aeronautics Board, such certificates confer no right to utilize a particular airport

4. Burden on Interstate Commerce.

There is no evidence in this case that the Burbank ordinance imposed or would impose *any* burden on interstate commerce. The evidence introduced in this case to demonstrate the effect the Burbank ordinance would have if it were applied to all major airports throughout the United States is purely an attempt to cloud the issue. The extent to which air commerce requires a single authority in control is a legislative question, not a judicial question. Up to the present time Congress has not seen fit to place airports utilized by air commerce under the control of any Federal agency, and airport proprietors are not subject to Federal economic or other regulation except in the area of airport *safety*.

5. Violation of Fifth, Ninth and Tenth Amendment Rights.

Lockheed, as the proprietor and operator of the Hollywood-Burbank Airport, is riding roughshod over the rights of owners of property surrounding the airport in violation of the Fifth Amendment. Their liberty and the use of their property are severely restricted by the adverse environment imposed on them by a private corporation for private gain, and without just compensation having been paid. The Burbank ordinance seeks in some degree to preserve Fifth Amendment rights until due process is satisfied and just compensation paid. If the Fifth Amendment is not applicable, there is a respectable body of opinion that the right to a quiet environment is one of the rights retained by the

people under the Ninth and Tenth Amendments, and that action which leads to the destruction of the environment may be restrained or limited.

6. Griggs v. Allegheny County.

Griggs v. Allegheny County, 369 U.S. 84 (1962), and the decisions of the Court of Appeals and the District Court in this case cannot stand together. If the decision in this case is allowed to stand without reversal of *Griggs*, then the Federal Aviation Administration will be able to continue its questionable course of conduct without interference, and the Federal government and the airlines will remain shielded from liability for their actions or non-action.

7. The Solution.

There can be no question that interim measures, such as the Burbank ordinance, are morally, socially and environmentally necessary. The preemption and conflict doctrines of this Court mark out a sufficient area in which interim measures, such as the Burbank ordinance, can fit, without violation of the Supremacy Clause of the United States Constitution.

Should *Griggs* be reversed so that Federal government and the airlines would become liable for the "taking" of air or noise easements, and, more importantly, should this Court sustain the Burbank ordinance, there is every prospect that the airlines and the Federal Aviation Administration would then be able to prevail on Congress to declare a preemption of this field. If such should

occur, then, under existing preemption and conflict doctrines, the States and local governments, and the Courts, would be powerless to protect their citizens from the adverse effects of jet aircraft noise pollution, even though Congress, or the agency which administers its laws, has failed to take adequate and effective steps to protect the health, safety and welfare of these citizens.

This Court is, therefore, respectfully urged to reexamine the preemption and conflict doctrines as presently enunciated and take upon itself the burden of defining those areas in which States and local governments may properly exercise their police powers, and the Courts may act, notwithstanding a declaration of Federal preemption. It is suggested that a proper rule would be that such State and local governmental enactments, and Court applied restraints, would be valid, provided it is demonstrated that the enactment or restraint in question is reasonable and necessary under the circumstances. Such a rule would find adequate support under the Ninth and Tenth Amendments.

ARGUMENT.

1. The Problem.

We are before this Court because there is no other place to go for relief. Legislation before Congress, which held some promise of future relief from jet aircraft noise by transferring the Federal Aviation Administrator's powers under Section 611 (14 U.S.C. §1431) of the Federal Aviation Act of 1958 to the Administrator of the Environmental Protection Agency (Senate Bill No. 3342 introduced March 14, 1972), failed to survive under the combined assault of the airlines and the Federal Aviation Administration.

Noise Pollution.

The effect and extent of noise pollution in this country, as revealed during the course of Congressional debate on this bill and a companion bill in the House of Representatives (H.R. 11021) are frightening. According to an Environmental Protection Agency report, noise appears to affect to a measurable degree of impact at least 80 million persons, or approximately 40% of the present population of the United States. Of that number, at least one-half are believed to be risking potential health hazards, hearing impairment in particular, as the result of long enduring exposure to noise.[18] The effect is psychological, physiological and sociological. There is proof that many people in our mental institutions have been put there as a result of excessive noise and irritation caused by noise. Noise affects the body physically and can cause different diseases. As many as 44 million persons in the United

[18] 118 Cong. Rec. (daily ed. Feb. 29, 1972) No. 29 at p. H 1509.

States have the utility of their dwellings adversely affected by noise from traffic and aircraft.[14] Noise can be a cause of accidents by masking auditory warnings and by increasing annoyances and fatigue and decreasing alertness.[15] Aircraft noise during the normal sleeping hours has a compounding impact on residents because the noise cannot be assimilated as it is during the day with other noises. One jetliner taking off at midnight has 10 times the effective noise impact of the same plane taking off at noon.[16] Noise pollution is the greatest non-killing health hazard in America today.[17]

In terms of destruction of our environment noise pollution ranks with air and water pollution.[18] Noise caused by jet aircraft and its effects are well documented in definitive works on this subject.[19] The intensity and effect of noise pollution resulting from operations at Hollywood-Burbank Airport and other airports in the Los Angeles area, and the prospects for the future, have been the subject of a specific study.[20] This study reveals that in areas immediately surround-

---

[14] *Id.* at p. H 1510.
[15] *Id.* at p. H 1518.
[16] *Id.* at p. H 1534.
[17] *Id.* at p. H 1510.
[18] Panel on Noise Abatement, Dept. of Commerce, *The Noise Around Us* 2 (1970).
[19] Hildebrand, *Noise Pollution: An Introduction to the Problem and an Outline for Future Legal Research*, 70 Colum. L.Rev. 632; Wyle Laboratories Research Staff, *Supporting Information for the Adopted Noise Regulations—Final Report to the Department of Aeronautics* (Report No. WCR 70-3 (R)), 1971; California Department of Public Health, *A Report to the 1971 Legislature on the Subject of Noise Pursuant to Assembly Concurrent Resolution 154, 1970* (1971).
[20] Branch and Beland, *Outdoor Noise and the Metropolitan Environment—Case Study of Los Angeles with Special Reference to Aircraft*, 1970 (Library of Congress Catalog Card No. 72-126027).

ing airports, low-flying aircraft and those taking off, taxiing and testing engines on the ground generate the most intense and frequent noise in the city.[21] It further reveals that the smaller jet aircraft of the type which utilize the Hollywood-Burbank Airport produce an unacceptable level of noise (100 plus PNdb) over an area approximately one mile in width and extending from two to three miles from the end of the airport's runways.[22] It further noted that noise levels in excess of 87 PNdb cause substantial speech interference and produce various temporary changes in the physiological state. The most important of these is a reduction in the size of the median and smaller arterials. Some of the side effects of this phenomenon are an increase in pulse rate, a paling of the mucous membrane throughout the organism, and an increase in respiration rate. In addition, rest and relaxation is interfered with to a substantial degree. It is the conclusion of this study that although apparently higher sound levels can be tolerated by man without permanent damage or breakdown from this cause alone, an urbanwide limit above 87 PNdb would be indefensible and irresponsible.[23] As to aircraft noise specifically, it is stated that such noise in excess of 82 PNdb impairs conversation and reading outdoors, and generally disturbs concentration, especially when aircraft over-flights are frequent and the climate favors outdoor activity, and that aircraft noise is psychologically more intrusive because of its contrast with the usual sound level and its relatively "sudden" occurrence.[24]

---

[21] *Id.* at p. 8.
[22] *Id.* at p. 21.
[23] *Id.* at p. 40.
[24] *Id.* at p. 41.

Posture of the Federal Aviation Administration.

Turning now to the posture and lack of effort on the part of the Federal Aviation Administration with respect to aircraft noise abatement, the statements of various members of Congress in the course of the debates on the bills referred to above are particularly revealing (these statements were made in an unsuccessful attempt to persuade the House of Representatives to shift aircraft noise abatement authority from the Federal Aviation Administrator to the Administrator of the Environmental Protection Agency):

Congressman Wydler:

"The problem is, however, although they [FAA] have competence they have shown to the Congress of the United States and to the American people a complete and utter lack of willingness to use the authority which we give them to set the limits on jet noise which they should be setting.

"In other words, Mr. Chairman, it is not enough to say that the FAA is competent to do the job. The question we have to answer in this House today is whether the FAA intends to do the job and intends to do anything to utilize the powers that we gave them or whether they intend to remain, as they apparently have over the years, a very willing partner of the airline industry in keeping effective regulations from being put into effect.

"Mr. Chairman, if you will look at the record of the FAA in this field, you will see that what I am saying is a fair and just statement. The Congress three and a half years ago in 1968 passed a bill which would have given and in fact did give the FAA the power to take action in the area of re-

ducing jet noise for presently flying aircraft. Those are the aircraft making the noise and the aircraft which will be making the noise for the next decade or 15 years. We gave to the FAA the power to reduce noise in those aircraft and set limits which could have meant that they would be retrofitted with noise suppression devices to bring the levels of noise down. For three and a half years the FAA stalled us and the American people and has taken the position that industry wanted them to take and done nothing."[35]

Congressman Mikva:

"If the past is any guide, we are not likely to bring much relief to residents in the vicinity of our airports by turning over to the FAA the power to set noise standards for airplanes."[36]

Statements of other Congressmen on this subject are found in the footnotes.[37] These statements confirm

---

[35]118 Cong. Rec. (daily ed. Feb. 29, 1972) No. 29 at p. H 1515-16.

[36]*Id.* at p. H 1517.

[37]118 Cong. Rec. (daily ed. February 29, 1972) No. 29:

Congressman Ryan:

"Unfortunately history has demonstrated the reluctance of the FAA to undertake a meaningful program of aircraft noise abatement." (at p. H 1519)

Congressman Drinan:

"In the original version of this legislation the EPA had veto power over the FAA-drafted standards, but in this bill it has been stripped of that power.

"In view of the FAA's history of being dominated by the very industry it is supposed to regulate, I consider this change highly unfortunate." (at p. H 1520)

Congressman Badillo:

"The FAA continues to be dominated by the airline industry which has consistently opposed any retrofit requirement for the existing jet fleet. As a result, the din of jet noise over city and suburb has become unbearable." (at p. H 1512)

what others have been saying regarding the failure of the Federal Aviation Administration to provide any meaningful relief from jet aircraft noise.[28] Oftentimes these comments are less restrained.[29] A good example of

---

Congressman Fraser:

"The Federal Aviation Administration—FAA—has failed in the task assigned it by Congress 3 years ago—to quiet the noise of jet aircraft operating in and out of our Nation's airports." (at p. H 1523)

Congressman Gude:

"The FAA has failed time after time to move in regard to this jet noise problem." (at p. H 1530)

* * * *

"It is high time for the Congress to act to silence the jets. The Federal Aviation Administration has had the authority to impose jet noise restrictions for some 3½ years. Their lack of substantive action to date would indicate to me that, at best, a certain ennui has settled over the FAA." (at p. H 1530)

Congressman Addabbo:

"The FAA has been all along and for too long airline oriented." (at p. H 1531)

* * *

"The people's health should not be secondary to the economics of the airlines." (at p. H 1531)

[29]One commentator has described the situation in this fashion:

"The FAA has attempted to play both ends against the middle—with the private citizens winding up in the middle. It piously states that no complete answer can come from the federal government and that local regulation is both necessary and desirable. At the same time, it accepts with open arms the court determinations that any action to relieve the noise nuisance of aircraft must come from the federal government, i.e., the FAA, and impedes action by municipalities which goes beyond programs of 'compatible land use.' It seems to be going out of its way to limit local regulation while providing little in the way of a national solution; and this serves only the interest of one segment of the public—the industry it was set up to regulate." Berger, *Nobody Loves an Airport*, 43 So.Cal.L.R. 631, at p. 724 (1970).

[30]See Kanner, *Some of My Best Friends Use Airports*, 12 California Trial Lawyers Journal, Spring, 1972, No. 2, pp. 61-[illegible]; Berger; *You Know I Can't Hear You When the Planes Are Flying*, 4 Urban Lawyer 1 (1972); Fadem & Berger, *A Noisy Airport Is a Damned Nuisance!*, 3 Southwestern Univ.L.R. 39 (1970).

this "no-action" policy of the Administrator is found in his opinion in *In the Matter of the Petition of Jordan A. Dreifus*, FAA Regulatory Docket No. 9071, the full text of which is set forth in the Appendix to this Brief (p. 4).

It is worthy of note that at every opportunity the Federal Aviation Administration expressly disclaims that the noise standards which it adopts are acceptable in any specific airport environment and following its previous pattern declares that airport owners acting as proprietors can deny the use of their airports to aircraft on the basis of noise considerations.[80] The net result is that airport proprietors are *not* regulated in terms of the permissible level of noise which may be created by aircraft using their airports. This attitude and approach by the Federal Aviation Administration allows the Federal government to remain immune from liability for aircraft noise under *Griggs v. Allegheny County*.[81] It also permits the Federal Aviation Administration to parry the thrust of citizens' complaints by pointing to the airport proprietor as the culprit. As a result we have the "lacuna" about which the California Supreme Court warned in *Loma Portal Civic Club v. American Airlines, Inc.*[82]

Even in the one area where the Federal Aviation Administrator has acted—the adoption of noise stand-

---

[80]Letter dated June 22, 1968 from the Secretary of Transportation to the Committee on Interstate Commerce contained in Senate Report No. 1353, 90th Cong. 2d Sess. 6-7 (1968); *In re Dreifus*, FAA Regulatory Docket No. 9071 (7/10/69); 14 C.F.R. §36.5. (These are included in the Appendix to this Brief).

[81]369 U.S. 84 (1962).

[82]61 Cal.2d 582, 39 Cal.Rptr. 708, 394 P.2d 548, at p. 554 (1964).

ards for new subsonic turbojet-powered aircraft—his actions again demonstrated a lack of concern for the needs of people and a subservience to the aircraft industry. Prior to the adoption of these standards, the FAA had stated that it was "well within the state of the art" to achieve noise levels of 106 EPNdb (this is a refinement of the PNdb concept which takes into account the duration of noise and pure tones such as the whine of a jet engine) measured at three statute miles from the start of take-off, one statute mile from the landing threshold, and 1,500 feet from the centerline of the runway.[83] In spite of this, the standards as actually promulgated permit noise levels of 108 EPNdb at points farther from the runway than originally proposed and levels as high as 110 EPNdb, if a greater reduction of sideline noise is achieved.[84] The difference between 106 EPNdb, as originally suggested, and 110 EPNdb represents a substantial increase—approximately 50%. To make matters worse, the Administrator exempted from these standards the first group of approximately 160 Boeing 747's.[85] Other exemptions will no doubt be forthcoming.

The Administrator's record with respect to existing jet aircraft is equally unimpressive. In July of 1970 he released a study prepared by Rohr Corporation[86] which

---

[83]Letter, J. D. Blatt, Associate Administrator, FAA, to William M. Allen, President of Boeing Co., Sept. 1, 1966; Letter from Airport Operators Council International to FAA, May 16, 1969.

[84]14 C.F.R. §36.5.

[85]Lesser, *The Airport Noise Problem: Federal Power But Local Liability*, 3 Urban Lawyer 175 at p. 204 (1971). See also Berger, *Nobody Loves An Airport*, 43 So.Cal.L.R. 631 (1970) at pp. 771-774.

[86]Final Report FAA-N0-70-11 by Rohr Corporation, dated July, 1970, prepared for Department of Transportation, Fed-

(This footnote is continued on next page)

reached the conclusion that the 727's, the 737's and the DC-9's (the largest type of jet aircraft presently in use at the Hollywood-Burbank Airport) could be retrofitted to achieve reductions of 5 EPNdb in noise levels on take-off and 10 EPNdb on landing, and in the case of 707 and DC-8 jet aircraft, reductions of 8 EPNdb on take-off and 13 EPNdb on landing. That these reductions would be substantial is borne out by the fact that a reduction of 8 EPNdb on take-off noise of the 707 and DC-8 jet aircraft would drop the annoyance level by 45% and a reduction of 13 EPNdb would drop the annoyance level by some 60%.[37] The study further advises that the cost of retrofitting could be recovered through nominal fare increases.[38] The release of this report was followed in November of the same year by the issuance of an FAA Advance Notice of Proposed Rule Making concerning civil airplane noise reduction retrofit requirements.[39] Although hearings have been held on this subject by the Federal Aviation Administrator, nothing resulted, and in the early part of this year the Administrator postponed further consideration of the matter for 18 months.[40]

---

eral Aviation Administration, Office of Noise Abatement, *Economic Impact of Implementing Acoustically Treated Nacelle and Duct Configurations Applicable to Low Bypass Turbofan Engines.*

[37] *Supra*, footnote 35.

[38] *Supra*, footnote 36.

[39] 35 Federal Register 16,980 (Nov. 4, 1970).

[40] 118 Cong. Rec. (daily ed. February 29, 1972) No. 29 at p. H 1538. In that regard Congressman Biaggi stated:

"Congress passed the Noise Abatement Control Act in 1968 authorizing the FAA to set noise limits and regu-

An equally distressing aspect of this matter is to find the Federal Aviation Administrator joining with the Air Transport Association in almost every recent case involving attempts by State and local governments to do something constructive and necessary with respect to noise pollution caused by jet aircraft.[41] This case is a good example. Shortly after Lockheed and PSA withdrew their application for preliminary injunction on May 27, 1970, so that the Burbank ordinance would be effective again on July 13, 1970, the Air Transport Association filed an application to intervene as a plaintiff and the application was granted. From that time on the case was substantially under the control of the attorneys of that organization and this control has continued up to the present time. Amicus briefs were filed by the Federal Aviation Administration in the District

---

the installation of jet noise suppressors on existing aircraft. In November of 1970—almost 2 years after receiving the authority—the FAA issued an announcement of proposed rulemaking to require installation of noise suppression devices on existing jets.

"At the time, I lauded this action as a definite step forward in reducing noise pollution in metropolitan areas such as New York. Had the FAA continued on its plan of action at that time, a rule could have been formulated by now and citizens could have looked forward to less noise in a few years.

"But no, the FAA buckled down under the pressure of the airlines industry and *in the spring of this year announced an 18-month delay in the rulemaking procedure.* I can only presume that this Agency intends to wait until such a rule is no longer needed." (Italics added).

[41] *E.g., Opinions of the Justices of the Supreme Judicial Court of Massachusetts*, 271 NE 2d 354 (1971); *Air Transport Association of America, et al. v. City of Inglewood, et al.* (No. 71-1153-CC) and *United States (Federal Aviation Administration) v. City of Inglewood, et al.* (No. 71-1632-CC), in the United States District Court for the Central District of California, both of which involved the validity of an ordinance of the City of Inglewood which imposed noise limitations on aircraft which fly below the minimum altitude of flight prescribed by the FAA for landing and take-offs.

Court and the Court of Appeals. This same practice, with some variations, has been followed in other cases.[42] Two state court cases apparently escaped their notice, one in California[43] and one in New Jersey,[44] both of which held that the Federal government had not preempted the field in which we are involved.[45]

Relief Through the Courts.

The decision of the Court of Appeals in this case, buttressed as it is by the decision of the District Court, is one more nail in the environmental coffin. The decision has already been cited and used in denying relief to those seeking some relief from the adverse effects of noise pollution caused by jet aircraft.[46] In June of 1971 the Governor of the State of Rhode Island cited the District Court's decision as a ground for vetoing a bill enacted into law by the Rhode Island Legislature which would have prohibited the scheduling of commercial airline flights to or from the Providence Airport between 11:00 p.m. and 7:00 a.m.[47] These de-

---

[42]*Supra*, footnote 41.

[43]*Stagg v. Municipal Court of Santa Monica Judicial District*, 2 Cal.App.3d 318, 82 Cal.Rptr. 578 (1969).

[44]*Township of Hanover v. Town of Morristown*, 108 NJ Super. 461, 261 Atl. Rptr. 2d 692 (1969).

[45]It is reported that ATA and others are attempting to intervene in the New Jersey case. It is also reported that the FAA is seeking a Federal Court injunction to enjoin enforcement of the court imposed curfew on the Morristwon Airport on the ground that it violates the Supremacy Clause. See *Aviation Week & Space Technology*, Nov. 6, 1972, at p. 19.

[46]It was cited by the District Judge in the Inglewood case referred to in footnote 41, *supra*, in holding that the Inglewood ordinance violates the Supremacy Clause. It was also cited in *Virginians for Dulles v. Volpe*, 344 F. Supp. 573 (1971) as authority for denying relief to those residing in the vicinity of Washington National Airport.

[47]Message of Governor dated June 22, 1971.

cisions are of course but a continuation of decisions of other Federal lower courts.[48] But as noted in our Jurisdictional Statement, the decision of the Court of Appeals is the first decision of courts of that level which has unequivocally held as a *matter of law* and no matter what the circumstances may be, that States and local governments have no power to enact any regulations relating to airport proprietors.[49] It is the purpose of the ensuing argument to demonstrate that this seemingly impenetrable facade of Federal power, which has been constructed bit by bit through the decisions of the lower Federal courts, should and must be breached.

2. The Preemption Issue.

Forgotten in the rush to declare the supremacy of Federal power in the area of aircraft noise abatement, is the fact that regulation of aircraft and the use of the navigable airspace derives not from the Supremacy Clause, but from the Commerce Clause. The Federal acts relating to air commerce, such as the Federal Aviation Act of 1958, are based on the power granted to the Federal government to regulate commerce and not on national ownership of the navigable air space, as distinguished from sovereignty. And the exercise of Federal commerce power does not prevent state action consistent with that power. This was made clear in *Braniff Airways v. Nebraska State Board*, 347 U.S.

---

[48] *American Airlines, Inc. v. Hempstead*, 272 F. Supp. 226 (E.D.N.Y. 1967), *aff'd* 398 F.2d 369 (2d Cir. 1968), *cert. denied*, 393 U.S. 1017 (1969); *Allegheny Airlines, Inc. v. Cedarhurst*, 238 F. 2d 812 (2d Cir. 1956); *American Airlines Inc. v. Audubon Park*, 297 F.Supp. 207 (W.D.Ky. 1968), *aff'd per curiam*, 407 F. 2d 1306 (6th Cir. 1969), *cert. denied*, 396 U.S. 845 (1969).

[49] Jurisdictional Statement, p. 10.

590 (1945), where the Court stated (347 U.S. at pages 596, 597):

> "These Federal Acts regulating air commerce are bottomed on the commerce power of Congress, not on national ownership of the navigable air space, as distinguished from sovereignty."
>
> * * * *
>
> "The commerce power, since Gibbons v. Ogden (US) 9 Wheat. 1, 193, 6 L ed 23, 69, has comprehended navigation of streams. Its breadth covers all commercial intercourse. But the federal commerce power over navigable streams does not prevent state action consistent with that power. Gilman v. Philadelphia (US) 3 Wall. 713, 729, 18 L ed 96, 100. Since, over streams, Congress acts by virtue of the commerce power, the sovereignty of the state is not impaired."

Likewise forgotten is the fact that this Court has been less willing to find preemption where the state action or regulation is designed to protect the health or welfare of those who reside or work in a particular State or community. This was amply demonstrated in the decision of this Court in *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960).

With these preliminary observations, we will proceed with an examination of the preemption issue.

No Express Preemption.

There is nothing in the Federal Aviation Act of 1958 (49 U.S.C. §1301, *et seq.*) which would suggest that Congress intended to preempt the regulation of airport proprietors. In fact the Act itself suggests to

the contrary. Section 1106 of that Act (49 U.S.C. §1506) provides as follows:

> "Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."

In *Head v. Board of Examiners*, 374 U.S. 424 (1963), Mr. Justice Brennan, in commenting on an identical provision contained in the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. §§151 *et seq.*, stated (separate concurring opinion 374 U.S. pages 443-444):

> "Rather than mandate ouster of state regulations, several provisions of the Communications Act suggest a congressional design to leave standing various forms of state regulation, including the form embodied in the New Mexico statute. First, the Act contains a 'saving clause,' 47 U.S.C. §414, providing that 'Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.' Of course, such a general provision does not resolve specific problems, Arrow Transp. Co. v. Southern R. Co., 372 US 658, 671, note 22, 10 L ed 2d 52, 60, 83 S Ct. 984, but *its inclusion in the statute plainly is inconsistent with congressional displacement of the state statute unless a finding of that meaning is unavoidable.*" (Italics added).

In *Loma Portal Civic Club v. American Airlines, Inc.*, 61 Cal. 2d 582, 39 Cal. Rptr. 708, 394 P. 2d

548 (1964), the California Supreme Court took a similar view of the effect of the "saving clause" (49 U.S.C. §1506) in the Federal Aviation Act of 1958 (394 P. 2d 548 at page 555):

> "Here we have an expression of the intent of Congress. The Federal Aviation Act expressly declares that 'Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.' (49 U.S.C. §1506.) Thus, it is clear that the federal legislation was not intended to be exclusive."

Rules for Determining Preemption.

The validity of a claim of Federal preemption cannot be judged by reference to broad statements about the "comprehensive" nature of Federal regulations under a particular Act or the "exclusive jurisdiction" of Congress. Thus in *Head v. Board of Examiners, supra,* it is stated (374 U.S. at pages 429-430):

> "In dealing with the contention that New Mexico's jurisdiction to regulate radio advertising has been preempted by the Federal Communications Act, we may begin by noting that the validity of this claim cannot be judged by reference to broad statements about the 'comprehensive' nature of federal regulation under the Federal Communications Act. '[T]he "question whether Congress and its commissions acting under it have so far exercised the exclusive jurisdiction that belongs to it as to exclude the State, must be answered by a judgment upon the particular case." Statements

concerning the "exclusive jurisdiction" of Congress beg the only controversial question: whether Congress intended to make its jurisdiction exclusive.' California v. Zook, 336 US 725, 731, 93 L ed 1005, 1010, 69 S Ct 841. Kelly v. Washington, 302 US 1, 10-13, 82 L ed 3, 10, 12, 58 S Ct 87."

Earlier, in *California v. Zook*, 336 U.S. 725 (1949), the Supreme Court had expressed equal displeasure with the use of mechanical rules for determining congressional intent. There with respect to the "coincidence means invalidity" theory advanced in previous opinions, the Court stated (336 U.S. at pages 729 and 732-733):

"The Court could not have intended to enunciate a mechanical rule, to be applied whatever the other circumstances, indicating congressional intent."

* * * *

"In short, we would be setting aside great numbers of state statutes to satisfy a congressional purpose which would be only the product of this Court's imagination."

The reliance of the Court of Appeals and the District Court on *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947) is misplaced. Involved in that case was the United States Warehouse Act (39 Stat. 486, c. 313), as amended. It was expressly declared in Section 29 of the Act that "the power, jurisdiction and authority" of the Secretary of Agriculture conferred under the Act "shall be exclusive with respect to all per-

sons" licensed under the Act (331 U.S. at page 233), and similar unambiguous statements were made in the reports of the Committees of the Senate and the House of Representatives (331 U.S. at pages 232-234)...

Notwithstanding this broad and positive declaration of preemption, this Court held, with respect to three other matters covered by the Illinois Public Utilities Act, as follows (331 U.S. at page 237):

> "The United States Warehouse Act contains no provisions relating expressly to these three matters. And we are told that the Secretary of Agriculture has made no attempt to exercise any jurisdiction over them. But possibilities of conflict and repugnancy are conjured up."
>
> * * * *
>
> "Any such objections are at this stage premature. Congress has not foreclosed state action by adopting a policy of its own on these matters. Into these fields it has not moved. By nothing that it has done has it preempted those areas. And see Federal Compress Co. v. McLean, supra (291 US p. 23, 78 L ed 627, 54 S Ct. 267). In more ambiguous situations than this we have refused to hold that state regulation was superseded by a federal law. Penn Dairies v. Milk Control Commission, 318 US 261, 87 L ed 748, 63 S Ct 617."

As will be seen, the Federal Aviation Act of 1958 (49 U.S.C. §1301, *et seq.*) contains no provisions expressly relating to airport proprietors, except a provision adopted in 1970 relating to airport safety,[10] and the Federal Aviation Administrator has made no attempt to exercise jurisdiction over them in terms of abatement of aircraft noise.

---

[10] *Supra*, footnote 9.

National Uniformity.

To achieve any meaningful discussion of the more recent decisions of this Court, it is first necessary to consider the proposition as to whether the Burbank ordinance impinges on an area inherently requiring national uniformity. That it does not, requires little more than a consideration of the situation at Hollywood-Burbank Airport. By any standard it is inadequate even from the standpoint of safety. It has no "clear" zones. Its runways terminate at public streets. On leaving the airport boundaries, aircraft are immediately over thickly populated areas no matter what the direction of take-off may be. In the terms used by this Court in *Griggs v. Allegheny County*,[51] this airport is "inoperable". In contrast, there are many airports throughout the country where the impact of aircraft noise on those who live or work in surrounding areas is reduced to a minimum because of favorable physical location or the acquisition of necessary clear zones and avigation easements. To say that all airports require national uniformity in terms of hours of operation or permissible levels of noise is equivalent to saying that airports must accept all types of aircraft, even though the runways of some are not adequate for the larger aircraft.

Beyond this it has been repeatedly recognized that national uniformity in this area of regulation is neither desirable nor possible. Thus in a letter dated June 22, 1968, submitted by the Secretary of Transportation to the Senate Committee on Interstate Commerce[52] at the time of its consideration of the addition of Section

---

[51] 369 U.S. 84 (1962).

[52] This letter is set out in full in the Appendix to this Brief at pp. 1-2.

611 (49 U.S.C. §1431) to the Federal Aviation Act of 1958, he stated:

> "Just as an airport owner is responsible for deciding how long the runways will be, so is the owner responsible for obtaining noise easements necessary to permit the landing and takeoff of the aircraft. The Federal Government is in no position to require an airport to accept service by larger aircraft and, for that purpose, to obtain longer runways. Likewise, the Federal Government is in no position to require an airport to accept service by noisier aircraft, and for that purpose to obtain additional noise easements. The issue is the service desired by the airport owner and the steps it is willing to take to obtain the service. In dealing with this issue, the Federal Government should not substitute its judgment for that of the States or elements of local government who, for the most part, own and operate our Nation's airports. The proposed legislation is not designated to do this and will not prevent airport proprietors from excluding any aircraft on the basis of noise consideration."

The Committee concurred in these views.[88]

In connection with the adoption of aircraft type certification noise standards for new subsonic aircraft,[89] the Federal Aviation Administrator stated:

> "The noise limits specified in Part 36 are the technologically practicable and economically reasonable limits of aircraft noise reduction technol-

---

[88]Senate Report No. 1353, 90th Cong. 2d Sess. 6-7 (1968). See also Appendix to this Brief, p. 1.

[89]34 Federal Register 18355-18356, November 18, 1969, now 14 C.F.R. §36.5. See also Appendix to this Brief p. 3.

ogy at the time of type certification and are not intended to substitute federally determined noise levels for those more restrictive limits determined to be necessary by individual airport proprietors in response to the locally determined desire for quiet and the locally determined need for the benefits of air commerce."

Finally we have the decision of the Federal Aviation Administrator *In The Matter of the Petition of Jordan A. Driefus*, FAA Regulatory Docket No. 9071, the full text of which is set forth in the Appendix to this Brief (p. 4). The situation there presented was this. The City of Santa Monica, in response to a locally determined desire for quiet, had enacted an ordinance which provided that "no pure jet aircraft shall take off from the airport [Santa Monica Municipal Airport] between the hours of 11:00 o'clock p.m. of one day and 7:00 a.m. of the next day." At the time the Petition referred to was filed with the FAA and at the time the Federal Aviation Administrator acted thereon, the Superior Court of the State of California for the County of Los Angeles had declared the ordinance invalid because its subject matter was preempted by State law (see *Stagg v. Municipal Court of Santa Monica Judicial District* (1969), 2 Cal. App. 3d 318, 319-320, 82 Cal. Rptr. 578, 579).[55] Based on this set of facts the petitioner, whose residence near the airport was being exposed to increasing turbo jet aircraft traffic and resulting noise, requested (as set forth in the decision) the Federal Aviation Administration to amend the Fed-

[55] At a later time the California Court of Appeal in the case referred to overturned the judgment of the Superior Court, holding that there was neither State nor Federal preemption of the field in which the Santa Monica ordinance operated.

eral Aviation Regulations to prescribe noise restrictions and limitations for turbo jet aircraft operating at the Santa Monica Municipal Airport of the type that the City of Santa Monica had attempted to impose by its ordinance. The arguments, as stated by the petitioner, embraced all of the contentions advanced by Lockheed, PSA and ATA in this case. Petitioner argued, among other things, that "failure of the FAA to issue restrictions at Santa Monica and other airports would allow the State and local governments to issue their own airport use restrictions" and further that "the restrictions would result in chaos, confusion, interference and obstruction to aircraft operations, which could be contrary to the national interest".[56] In response to this argument, the Federal Aviation Administrator stated:[57]

> "Petitioner's argument 8, describing the adverse effects of local airport use restrictions is not supported by any facts or experience known to the FAA. *This form of locally responsive noise control is clearly in the national interest in the light of the quoted portion of the Senate Report.* Further, there is no indication that the noise restrictions required by petitioner would be discriminatively applied." (Italics added).

As to petitioner's further argument (9) that "failure of the FAA to issue noise abatement regulations for Santa Monica and other airports would be incompatible with the primary reason for the Federal Aviation Act of 1958, which was the unification of the control of aircraft operations in a single Federal agency to assure

---

[56]Appendix to this Brief at p. 5.

[57]*Id.* at p. 11.

safety and the orderly development of aviation",[88] the Administrator's response was as follows:[89]

> "Petitioner's argument 9, covering the unification objective of the Federal Aviation Act of 1958, is correct insofar as it describes the need for a single Federal agency in the field of the safe, orderly development of aviation. However, the Senate Report makes it clear that, just as the FAA recognizes the proprietary interest of airport operators by not requiring an airport to accept service, so it should recognize the proprietary interest of airport operators by not substituting its judgment, so far as acceptance of noisy aircraft by the airport is conceived, for that of the State or local governmental elements that own and operate the nation's airports."

Thus we have clear and unequivocal statements by those charged with the administration of the Federal Aviation Act of 1958 (49 U.S.C. §1301, *et seq.*), which recognize the diversity of individual airports and their environments, and the need for restrictions in terms of the permissible levels of aircraft noise in particular airport environments, including time restrictions when operational regulations have failed to provide the needed relief. This recognition is accompanied by equally positive assertions that the Federal government is in no position to, and will not, enter this area of regulation.[90]

---

[88] *Id.* at p. 5.
[89] *Id.* at pp. 11-12.
[90] *Id.* at p. 9.

The Burbank Ordinance Is Not Preempted.

The most pertinent of the more recent decisions of this Court is *Colorado Anti-Distrimination Com. v. Continental Air Lines, Inc.*, 372 U.S. 714 (1963). At issue in that case was whether the Colorado Anti-Discrimination Act of 1957 was preempted by the Federal Aviation Act of 1958 and, in particular, by Section 1374(b) which prohibited air carriers from subjecting any person "to any unjust discrimination" and Section 1302(c) which required "the promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations." In holding that the Colorado Act had not been preempted by these sections of the Federal Aviation Act of 1958, this Court stated as follows (372 U.S. at pp. 723-724):

> "This is a familiar type of regulation, aimed primarily at rate discrimination injurious to shippers, competitors, and localities. But we may assume, for present purposes, that these provisions prohibit racial discrimination against passengers and other customers and that they protect job applicants or employees from discrimination on account of race. *The Civil Aeronautics Board and the Administrator of the Federal Aviation Agency have indeed broad authority over flight crews of air carriers, much of which has been exercised by regulations.* Notwithstanding this broad authority, we are satisfied that Congress in the Civil Aeronautics Act of 1938, and its successor had no express or implied intent to bar state legislation in this field and that the Colorado statute, *at least so long as any power the Civil Aeronautics Board may have remains 'dormant and unexercised,' will not frustrate any part of the purpose of the federal legislation.*" (Italics added.)

The Federal Aviation Administrator in his decision in the *Dreifus* matter made reference to the fact that the FAA, in an attempt to solve the problem, had provided for "(1) the use of a noise abatement runway when permitted by wind conditions; (2) the use of a noise abatement departure path to avoid congested areas; and (3) the use of raised traffic patterns."[81] He made further reference to section 91.87 of Part 91 of the Federal Aviation Regulations which prescribes noise abatement approach, departure and runway requirements for turbine powered and large airplanes.[82] He then observed as follows:[83]

> "Beyond these rules, and the FAA's monitoring of the Santa Monica Airport under the FAA Order, the FAA believes that further relief from aircraft noise *should involve* airport use restrictions similar to those that petitioner states were issued in the Santa Monica City Ordinance. In short, the FAA at present does not know of any action, short of the type attempted by Santa Monica, that will satisfy the needs of the neighbors of the airport or supply the relief requested." (Italics added.)

So in this case, the efforts in this regard of the FAA Chief of the Airport Traffic Control Tower at the Hollywood-Burbank Airport were likewise unsuccessful (A. 317, 319). As in the case of the Santa Monica Airport, the only feasible means of satisfying the "needs" of those who resided in the vicinity of the Hollywood-Burbank Airport was to impose the time restrictions on jet aircraft takeoffs as specified in the Burbank

---

[81] *Id.* at pp. 6-7.
[82] *Id.* at p. 7.
[83] *Id.* at p. 7.

ordinance (which conformed to those specified in the Santa Monica ordinance). If the power to impose such restrictions resides in the Federal Aviation Administrator, it remained "dormant and unexercised."[84]

Accordingly, at least until the Administrator acts, Burbank has the power to impose such restrictions.

On this point *Head v. Board of Examiners, supra*,[85] has further relevance. Before the Court in that case was the Constitutional validity of a statute of the State of New Mexico which prohibited certain price advertising methods in the sale of glasses over radio stations and in newspapers which also served the adjoining State of Texas. At issue, among others, was whether the statute was preempted by the Federal Communications Act. It appears from the opinion and the concurring opinion that at one time the Federal Communications Commission had intensively regulated the field of false, misleading or deceptive advertising designed for radio and television broadcast, but that since World War II it had largely left these matters in the hands of the Federal Trade Commission. In holding that the New Mexico statute had not been preempted, this Court stated (374 U.S. at p. 432):

> "As in Colorado Anti-Discrimination Com. v. Continental Air Lines, Inc. 372 US 714, at 724, 10 L ed 2d 84, 91, 83 S Ct 1022, we are satisfied that the state statute 'at least so long as any power the [Commission] may have remains "dormant and unexercised," will not frustrate any part of the purpose of the federal legislation.' "

---

[84] *Colorado Anti-Discrimination Com. v. Continental Airlines, Inc.*, 372 U.S. 714 (1963) at p. 724.

[85] 374 U.S. 424 (1963).

In *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960), the very issue was whether the City of Detroit by ordinance would require boilers, which had been approved and licensed by the Federal Government for use on navigable waters, to be replaced by other equipment in order to relieve that City from the effects of air pollution. In holding that it could and that the ordinance was not preempted by Federal legislation, this Court first observed as follows (362 U.S. at page 442):

> "The ordinance was enacted for the manifest purpose of promoting the health and welfare of the city's inhabitants. Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power. In the exercise of that power, the states and their instrumentalities may act, in many areas of interstate commerce and maritime activities, concurrently with the federal government."

It then pointed out that Congress had for many years maintained an extensive and comprehensive set of controls over ships and shipping, including the inspection of steam vessels, and that these inspections were broad in nature, including, among other things, boilers. It continued as follows (362 U.S. at pages 445 and 446):

> "The thrust of the federal inspection laws is clearly limited to affording protection from the perils of maritime navigation."
>
> * * *
>
> "By contrast, the sole aim of the Detroit ordinance is the elimination of air pollution to protect

the health and enhance the cleanliness of the local community."

* * *

"We conclude that there is no overlap between the scope of the federal ship inspection laws and that of the municipal ordinance here involved. For this reason we cannot find that the federal inspection legislation has pre-empted local action. To hold otherwise would be to ignore the teaching of this Court's decisions which enjoin seeking out conflicts between state and federal regulation where none clearly exists."

Totally apart from this view of the matter is the fact that Congress, in adding Section 611 to the Federal Aviation Act of 1958 (49 U.S.C. §1431), left airport proprietors unregulated insofar as the determination of the permissible level of noise that could be created by aircraft using their airports and, as already indicated, the discretion of airport proprietors in that regard has been repeatedly affirmed by the Federal Aviation Administrator.[46] This, in and of itself, is sufficient to validate the Burbank ordinance. Thus in *Rice v. Board of Trade*, 331 U.S. 247 (1947), companion cases to *Rice v. Santa Fe Elevator Corp.*, *supra*, the issue before the Court was whether Congress by enacting the Commodity Exchange Act, 49 Stat. 1491, c. 545, had preempted the ability of the Illinois Commerce Commission to regulate the Chicago Board of Trade, a commodity exchange. In holding that the Illinois Commerce Commission had the power to regulate the Chicago Board of Trade in those areas where

---

[46] *Supra*, footnote 2.

that Board had freedom to act, this Court stated (331 U.S. at page 254):

> "Insofar as those rules are concerned, all that the Act and the regulations of the Secretary do is to define the area in which the Board may provide standards for warehouses whose receipts are acceptable in satisfaction of futures contracts. By the terms of §5a(7) the requirements fixed by the Board must be 'reasonable' and they must relate to 'location, accessibility, and suitability for warehousing and delivery purposes.' If the Board transcends those bounds, it violates the Act. See §6b. But within that area it has considerable discretion.
>
> *"Hence it seems to us that no action of the Illinois Commission within the zone where the Board has freedom to act would contravene the federal scheme of regulation.* It would be quite a different matter if the Illinois Commission adopted rules for the Board which either violated the standards of the Act or collided with rules of the Secretary. But such collision is not necessary; and we cannot assume that the Illinois Commission will take any action which in any way impairs the federal regulatory scheme." (Italics added.)

Since Lockheed had the freedom and discretion to take the action necessary to exclude aircraft on the basis of noise considerations, the City of Burbank, under the foregoing decision, had the power to require Lockheed to exercise this discretion in the manner as set forth in the ordinance.

The comments of the California Supreme Court in *Loma Portal Civic Club v. American Airlines, Inc., supra,*[47] on the effect of a holding of Federal preemption are worth repeating. In that regard the Court stated (61 Cal. 2d at pages 591-592, 39 Cal. Rptr. at page 714, 394 P. 2d at page 554):

> "A holding of federal preemption would have the effect of disabling the state from any action in the entire field, and placing in the federal government complete and sole responsibility for regulation of all aspects of that field. Such a holding by a single state court would have, of course, no effect on the conduct of other states with respect to regulation of that field, and unless Congress had in fact intended such preclusion of state regulation and were to carry out its responsibilities, there would result within that state a lacuna which the state would be powerless to fill."

In this case we have a "lacuna" which the Burbank ordinance has attempted to fill.

3. The Conflict Issue.

The Court of Appeals resolved the conflict issue against the Appellants by concluding that the Burbank ordinance "stands as an obstacle to accomplishment and execution of the full purposes and objectives of Congress," citing *Perez v. Campbell,* 402 U.S. 637 (1971). The conflict which it found was with respect to a *non-mandatory* runway preference order of a minor FAA official in charge of the Air Traffic Control Tower at Hollywood-Burbank Airport (A. 426). By a

[47] 61 Cal. 2d 582, 39 Cal. Rptr. 708, 394 P. 2d 548 (1964).

footnote reference it is also stated that the Burbank ordinance terminated "the right of flight of prospective passengers" for the PSA 11:30 p.m. Sunday night flight "through this portion [Hollywood-Burbank Airport] of the airspace at this time" (A. 427, fn. 12). On the other hand the District Court appears not to have specifically considered the conflict issue in its opinion, but any deficiency in this regard was remedied by the Plaintiffs (Appellees here) by including in the Conclusions of Law two areas of alleged conflict, namely, (1) interference with Federally certificated rights,[68] and (2) interference with the use of the navigable airspace.[69] Each of these alleged conflicts will now be separately considered.

Runway Preference Order.

With respect to the non-mandatory runway preference order considered by the Court of Appeals (BUR 7100.5B),[70] it must be first observed that it was a procedural regulation for the guidance of those who desired to enter the navigable airspace, and was in no sense a restriction imposed by the Federal Aviation Administrator on Lockheed, the proprietor and operator of the Hollywood-Burbank Airport. Neither was it a regulation by the Federal Aviation Administrator of the type contemplated by Section 611 (49 U.S.C. §1431) of the Federal Aviation Act of 1958. It was presumably issued under the authority of FAA order 7100.13.[71] There was obviously no conflict between it and the Burbank ordinance. Nevertheless the Court of Appeals seized upon that portion of this procedural order

---

[68] Conclusion of Law No. 17 (A. 404-405).
[69] Conclusion of Law No. 18 (A. 405).
[70] Pl. Ex. 30 (A. 453-455).
[71] See Finding of Fact No. 56 (A. 392).

which stated that the "procedures . . . are designed to reduce the community exposure to noise to the lowest practicable minimum", and then went on to state that "This assertion represents a considered determination by an authorized representative of the FAA that measures of the magnitude of that taken by the City of Burbank are beneath 'the lowest practicable minimum'." A complete answer to this assertion is found in our discussion of the Preemption Issue under the hearings "National Uniformity" and "The Burbank Ordinance is Not Preempted", wherein we pointed out that this so-called "determination" was in conflict with the determination of the Federal Aviation Administrator in the *Dreifus* matter, namely, that when noise abatement and other procedural regulations had failed to provide needed relief, "further relief *should involve* airport use restrictions similar to those" imposed by the Santa Monica ordinance.[72] In making this statement the Administrator observed that, as the proprietor of the Washington National Airport he had imposed restrictions on its use.[73]

Time limitations, however, are not the only approved method of reducing the effects of aircraft noise. There was yet another measure available to reduce the community exposure to noise below this "lowest practicable minimum", namely, the exclusion of aircraft from Hollywood-Burbank Airport on the basis of noise considerations. This likewise had the specific approval of the Federal Aviation Administrator in *Dreifus*[74] and had earlier been asserted as a means of alleviating the adverse effects of aircraft noise by the

---

[72]Appendix to this Brief at p. 7. See also *infra*, footnote 81.

[73]*Id.* at pp. 5, 12.

[74]*Id.* at p. 11.

Secretary of Transportation."[15] It should be noted that the nonmandatory runway preference order on which the Court of Appeals relied was issued September 4, 1969.[16] The *Dreifus* opinion was issued July 10, 1969.[17]

In view of the foregoing, the only weight that can be properly accorded to the FAA Tower Chief's determination is that of all *noise abatement runway procedures* he had attempted,[18] this last one had the best prospects of achieving the greatest reduction of noise.

Interference With Federally Certificated Rights.

In an attempt to overcome the absence of any evidence of conflict with any Federal statute or regulation, the argument was advanced in the District Court and carried over into Conclusion of Law No. 17 (A. 404-405) that the Burbank ordinance somehow conflicted with Certificates of Public Convenience and Necessity held by the interstate carriers utilizing the Hollywood-Burbank Airport. That this argument has no merit is easily demonstrated. Under Section 401 of the Federal Aviation Act of 1958 (49 U.S.C. §1371) the Civil Aeronautics Board is empowered to issue Certificates of Public Convenience and Necessity *authorizing* interstate air carriers to engage in air transportation, and Certificates of Public Convenience and Necessity are issued in that form, *e.g.*, "Hughes Air Corp. is

---

[15] *Id.* at pp. 1-2.

[16] Pl. Ex. 30 (A. 453).

[17] Appendix to this Brief at p. 13.

[18] The FAA Chief of the Traffic Control Tower at Hollywood-Burbank Airport had tried three other and different noise abatement runway procedures: BUR 7100.5A, dated August 19, 1968 (A. 556-557); BUR 7100.5, dated April 23, 1968, (A. 458-459); and BUR 7100.3 dated Dec. 7, 1967 (A. 460-461).

hereby authorized . . ." [Pl. Ex. 8, A. 104]. Under Subsection (i) of Section 401 of the Federal Aviation Act of 1958 (49 U.S.C. §1371(i)) a Certificate of Public Convenience and Necessity issued by the Civil Aeronautics Board does not "confer any proprietary, property, or exclusive right in the use of any airspace, Federal airway, *landing area*, or air-navigational facility" (Italics added). The Civil Aeronautics Board itself has recently recognized the limitations imposed by this subsection in its decision in Pacific Northwest-California Investigation, Docket 18884 of May 12, 1970 [Pl. Ex. 35, A. 118] when it granted to Continental Air Lines, Inc. a route which involved the use of Ontario International, Long Beach Municipal, Hollywood-Burbank and Orange County Airports. As appears from its decision, the City of Long Beach and the County of Orange were unwilling to allow Continental to use their airport facilities and, in that connection, the Civil Aeronautics Board stated at page 13:

> "Since cooperation of the local airport authorities will be needed before any service can be inaugurated, it will be up to the satellite carrier [Continental Air Lines, Inc.] we have selected to convince these authorities that their express fears are exaggerated or are outweighed by affirmative considerations."

At the time of trial in this case Continental had been unsuccessful in persuading these local airport authorities to accept their aircraft and as a consequence it was not providing any service to or from these particular airports (A. 239-242).

Interference With Use of the Navigable Airspace.

The Burbank ordinance, of course, does not pretend to reach into the navigable airspace and control the flight of aircraft, as was attempted by the towns of Hempstead, Cedarhurst and Audubon Park.[79] Instead, it operates in an area not committed to Federal control. It operates against an airport proprietor who has failed to obtain air and noise easements necessary for the operation of the airport, and who has the power, without violating any Federal statute or regulation, to exclude aircraft on the basis of noise considerations.[80]

Admittedly it precludes entry into the navigable airspace from the Hollywood-Burbank Airport between the hours of 11:00 p.m. and 7:00 a.m. except in emergencies. That there is nothing unusual or unreasonable about this is attested by the fact that the Federal Aviation Administration, as proprietor of the Washington National Airport, has imposed more drastic restrictions on the use of that airport during the late evening and early morning hours[81] and, as already noted, the Federal Aviation Administrator himself has declared that this form of locally responsive noise control "is clearly in the national interest" and is not incompat-

---

[79] See cases cited in footnote 48, *supra*.

[80] See footnote 2, *supra*.

[81] See *Virginians for Dulles v. Volpe*, 344 F. Supp. 573 (1972) at p. 576; *In re Dreifus*, Appendix to this Brief at pp. 5, 12. At the time the House of Representatives was considering legislation which later became the Noise Control Act of 1972, Congressman Mikva had this to say: "One of the few successful attempts at regulation has been the ban on late evening and predawn jet traffic at Washington National Airport. I strongly urge other airports to follow this example. It is morally, socially, and environmentally necessary." 118 Cong. Rec. (daily ed. Sept. 29, 1972) No. 29, at p. H 1534.

ible with the primary reason for the Federal Aviation Act of 1958.[23]

The action of the Council of the City of Burbank, in enacting the ordinance in question, clearly accords with and implements the policy of Congress as expressed in its more recent legislative enactments, (*e.g.*, The National Environmental Policy Act, 42 U.S.C. §4321; Environmental Education Act, 20 U.S.C. §1531; Air Quality Act of 1967, 42 U.S.C. §1857 *et seq.*; Environmental Quality Improvement Act of 1970, 42 U.S.C. §§4372-4374).

Of importance for the purposes of this discussion are the observations of the California Supreme Court in *Loma Portal Civic Club v. American Airlines, Inc.* (1964), 61 Cal. 2d 582, 592, 39 Cal. Rptr. 708, 714, 394 P. 2d 548, 554:

> "Moreover, we note that noise abatement is a federal as well as a state aim, and when not inconsistent with safety . . . would not necessarily present a conflict with federal law but might well reinforce it."

The Court of Appeals, in its statement that the effect of the Burbank ordinance "was to terminate the right of flight of prospective passengers [approximately 80] *through* this portion of the airspace at this time," was obviously attempting to bring its prohibition within the language of Section 104 (49 U.S.C. §1304) of the Federal Aviation Act of 1958 which declares "a public right of freedom of *transit through* the navigable airspace of the United States" (Italics added). In actuality the ordinance did not deny freedom of transit through

---

[23]Appendix to this Brief at pp. 11-12.

the navigable airspace. What it did was prohibit *entry into* the navigable airspace from the land on which the Hollywood-Burbank Airport is located during the proscribed hours. While this difference may seem small, it is significant.

There is nothing in the Federal Aviation Act of 1958 which confers on the public or anyone else the right to *enter* the navigable airspace from land where such entry has been prohibited by an ordinance or land use regulation adopted by a municipality. It is well settled in California that, in the exercise of its police power, a municipality may enact ordinances the object of which is to abate or prevent nuisances caused by businesses located within its boundaries. *Thain v. City of Palo Alto*, 207 Cal. App. 2d 173, 24 Cal. Rptr. 515, 523 (1962) [Hearing denied by Supreme Court]; *Boyd v. City of Sierra Madre*, 41 Cal. App. 520, 183 Pac. 230, 232 (1919). It is also well settled that municipalities may enact land use regulations which have the same objective. *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

Furthermore, Congress has not ordained that every airport, no matter what its limitations may be, must remain open 24 hours a day[88] and must be available for

---

[88]The Hollywood-Burbank Airport could hardly be classified as a "24-hour" airport. Between the hours of 11:00 p.m. and 7:00 a.m. it is essentially a general aviation airport insofar as take-offs are concerned since the only scheduled departure during that period of time was the PSA 11:30 p.m. Sunday night flight. When weather conditions at Los Angeles International Airport prevent its use and United Air Lines planes land at Hollywood-Burbank Airport after midnight, they do so under an understanding with Lockheed that they will not take off until after 7:00 a.m. Apparently this is because Lockheed is unable to handle these aircraft during that period insofar as take-offs are concerned (A. 171-172). This understanding has been in effect for 15 or 20 years (A. 173).

use by every type of aircraft, no matter what the effect may be on those who reside in the surrounding area.

To elevate the possible convenience of 80 persons departing from the Hollywood-Burbank Airport for San Diego once a week on a Sunday night at 11:30 p.m. to a point of constitutional significance, is to us a perversion of this Court's teachings in *Perez* (402 U.S. 637) and other decisions. The same may be said of the non-mandatory runway preference order. It is clear from the *Perez* decision that if the majority of this Court had been convinced that the Arizona statute would serve to promote the health, safety or welfare of the citizens of Arizona, the constitutionality of the statute would have been sustained. The same observation is applicable to *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945) and *Bibb v. Navajo Freight Lines Inc.*, 359 U.S. 520 (1959).

Magnifying the possible convenience of these 80 persons and disregarding the need of thousands of persons who reside in the vicinity of Hollywood-Burbank Airport for uninterrupted sleep on a Sunday night prior to a Monday morning, does not comport with a proper approach in weighing the validity of the Burbank ordinance.

That the ordinance was reasonable and necessary is attested by the fact that the Due Process issue (XIV Amendment) was withdrawn by the Plaintiffs from the District Court's consideration (A. 66-67), and further statements made by the counsel for the plaintiffs during the course of the trial [R. Tr. pp. 437-438]. The need and necessity for providing some relief for those who reside in the vicinity of Hollywood-Burbank Airport is further demonstrated by the fact that in the area immediately south of the "North-South" runway the popu-

lation has decreased by 11.1% since 1960[84] and in the area immediately to the east of that area by 15.7%.[85] As to the area immediately to the east of the "East-West" runway, the population has decreased since 1960 by 7.4%.[86] All of the areas referred to are within the City of Burbank and subject to noise levels in excess of 100 plus PNdb.[87] This indicates that those who have been able to move from these areas have done so. The rest, presumably unable to do so, continue to remain subject to the severe noise pollution created by operations at the Hollywood-Burbank Airport. The only real relief that these residents have had is that provided by the Burbank ordinance during the short period of time that it remained in effect prior to the issuance of the restraining order and during the period from July 13 to November 30, 1970, as a result of Lockheed and PSA withdrawing their application for a preliminary injunction. It is worthy of note that the Federal Aviation Administration could have provided this needed relief, not by regulation of the airport proprietor (Lockheed), but through operational regulations imposed upon the aircraft which it controls. Instead, it chose to join with the ATA in seeking the invalidation of the Burbank ordinance.[88]

---

[84]U. S. Census, Burbank Code Area 3111: 1960 population, 4,286; 1970 population, 4,012.

[85]U. S. Census, Burbank Code Area 3110: 1960 population, 4,227; 1970 population, 3,650.

[86]U. S. Census, Burbank Code Area 3105: 1960 population, 3,363; 1970 population, 3,117.

[87]Branch and Beland, *Outdoor Noise and the Metropolitan Environment—Case Study of Los Angeles with Special Reference to Aircraft*, 1970 (Library of Congress Catalog Card No. 72-126027), at p. 21.

[88]See footnote 8, *supra*. The Court of Appeals made no specific mention of corporate jet aircraft, other than to note that such

(This footnote is continued on next page)

4. Burden on Interstate Commerce.

Although the Court of Appeals declined to consider the issue as to whether the Burbank ordinance constituted an unreasonable burden on interstate commerce, the District Court concluded that it did. This conclusion was reached, not because the ordinance did in fact burden interstate commerce, since it only affected one regularly scheduled intrastate flight and flights of corporate jet aircraft, but rather on the basis of ATA's contention that the ordinance had to be viewed as if it were adopted by all major airports within the United States. A similar approach was attempted by the airlines in the recent case of *Evansville-Vanderburgh Airport Authority District of Delta Airlines, Inc.*, 405 U.S. 707 (1972). There the airlines contended, as to the per

---

aircraft were likewise prevented from taking off during the proscribed hours. There is no evidence that this caused any hardship. In *Township of Hanover v. Town of Morristown*, 108 N.J. Super. 461, 261 Atl.Rptr.2d 692 (1969), the Court stated in part as follows (261 Atl. Rptr. 692, at pp. 701, 706):

> "At Morristown Airport the offensive engine noises for the most part are not emitted by airplanes serving the general public, but by the jets of the few corporate executives who own or charter the aircraft which noisily ride the invisible highway as an industrial status symbol. (See: Harley, Jr., TC, CCH Dec. 29, 803 [M], ¶7703 [M] [1969]). If not simply a symbol it is argued that time and energy of the corporate officer and employee is saved. The importance of the speed of travel to the corporate executive must be placed on one side of the scale and balanced against the domestic tranquility to which family and the neighborhood are entitled."
>
> * * *
>
> "Most intrusive is the noise from corporate jets. If these are truly used for business, why should not the hours of landing and take-off be limited to normal, reasonable business hours? The corporate executive's desire for early departure and late returns may have to be sacrificed in the interest of a good night's rest for the residents. He may have to leave a day earlier or return a day later. His absence for a few hours more or less will not send his corporation into bankruptcy."

capita charges imposed on airline passengers by State airport proprietors, that "If such levies were imposed by each airport along a traveller's route, the total effect on the cost of air transportation, could be prohibitive, the competitive structure of air carriers could be affected, and air transportation, compared to other forms of transportation, could be seriously impared" (405 U.S. at page 721). In rejecting this contention and concluding that these charges were constitutionally permissible, this Court stated (405 U.S., at page 722):

> "But there is no suggestion that the Indiana and New Hampshire charges do not in fact advance the constitutionally permissible objective of having interstate commerce bear a fair share of the costs to the States of airports constructed and maintained for the purpose of aiding interstate air travel. In that circumstance, '[a]t least until Congress chooses to enact a nation-wide rule, the power will not be denied to the State[s].' Freeman v. Hewit, 329 US, at 253, 91 L Ed at 272; see also Southern Pacific Co. v. Arizona, 325 US 761, 775-776, 89 L Ed 1915, 1928, 65 S Ct 1515 (1945)."

We should note here parenthetically that the airlines and the passengers which utilize the Hollywood-Burbank Airport are not bearing their "fair share" of the cost of their use of this airport. It is the owners of property and residents under the necessary approachways and departure paths of that airport who bear a substantial cost of its operation. Not only are the airlines and their passengers enjoying a "free ride" at the expense of these owners and residents, but so is Lockheed and the Federal government.

Effect of the Burbank Ordinance.

There is no evidence in this case that the enforcement of the ordinance has imposed or would impose *any* burden on interstate commerce. The burden, of course, was upon Lockheed, PSA and ATA to show that enforcement of the ordinance operated to prejudice interstate commerce (*Interstate Busses Corp. v. Holyoke Street R. Co.*, 273 U.S. 45 (1927) at p. 51). In enacting the ordinance the Council of the City of Burbank was fulfilling the duty imposed on it "to protect the well-being and tranquility" of the City (See *Breard v. Alexandria*, 341 U.S. 622 (1951) at p. 640).

The case of *Huron Portland Cement Co. v. Detroit, supra*, (362 U.S. 440), discussed in connection with the preemption issue, is equally pertinent to this issue. The following excerpts from the Court's opinion are relevant (362 U.S. at pp. 447-448):

> "The mere possession of a federal license, however, does not immunize a ship from the operation of the normal incidents of local police power, not constituting a direct regulation of commerce."
>
> * * *
>
> ". . . the Detroit ordinance requires no more than compliance with an orderly and reasonable scheme of community regulation. The ordinance does not exclude a licensed vessel from the Port of Detroit, nor does it destroy the right of free passage. We cannot hold that the local regulation so burdens the federal license as to be constitutionally invalid."

Huron cannot be viewed as an isolated declaration of law outside of the mainstream of this Court's teachings as to what constitutes an unlawful burden on

interstate commerce. It is the cornerstone of the decision in *Head v. Board of Examiners, supra* (374 U.S. 424), which, as we have previously observed, sustained a statute of the State of New Mexico forbidding certain price advertising methods in the sale of glasses over radio stations and in newspapers which also served the adjoining State of Texas. In so holding, the Court stated (374 U.S. at pages 428-429):

"Like the smoke abatement ordinance in the Huron case, the statute here involved is a measure directly addressed to protection of the public health, and the statute thus falls within the most traditional concept of what is compendiously known as the police power. The legitimacy of state legislation in this precise area has been expressly established. Williamson v. Lee Optical of Okla., Inc. 348 US 483, 99 L. ed 563, 75 S Ct 461. A state law may not be struck down on the mere showing that its administration affects interstate commerce in some way. 'State regulation, based on the police power, which does not discriminate against interstate commerce or operate to disrupt its required uniformity, may constitutionally stand.' Huron Portland Cement Co. v. Detroit, supra (362 US at 448).

"It has not been suggested that the statute, applicable alike to 'any person' within the State of New Mexico, discriminates against interstate commerce as such. Nor can we find that the legislation impinges upon an area of interstate commerce which by its nature requires uniformity of regulation. The appellants have pointed to no regulations of other States imposing conflicting duties, nor can we readily imagine any. Colorado Anti-

Discrimination Com. v. Continental Air Lines, Inc., 372 US 714, 10 L ed 2d 84, 83 S Ct 1022. We hold that the New Mexico statute, as applied here to prevent the publication in New Mexico of the proscribed price advertising, does not impose a constitutionally prohibited burden upon interstate commerce."

The Burbank ordinance, like the New Mexico statute, controls the *proprietor* of a business located within its boundaries. Conflict with regulations imposed by other cities or airport proprietors cannot be readily imagined.

The fears expressed by ATA's witnesses, that if the Burbank ordinance is sustained it will lead to a proliferation of similar restrictions throughout the country, find no basis in fact. States and elements of local government who, for the most part, own and operate our Nation's airports have always had the power to deny the use of their airports to aircraft on the basis of noise considerations,** and there is no evidence that this power has been indiscriminately or unreasonably exercised. There will be time enough for this Court, or other courts having jurisdiction, to consider the reasonableness of any regulations imposed by other local authorities or States on airport operations, when and if such occurs. The "possibilities of conflict and repugnancy" which ATA has "conjured up", by contending that the Burbank ordinance should be viewed in the aspect as if applied to all major airports throughout the United States, is purely an attempt to cloud the issue (See *Rice v. Santa Fe Elevator Corp., supra,* 331 U.S. at page 237).

**Footnote 2, *supra.*

Need for Single Authority.

The District Court, in its consideration of the interstate commerce issue, concluded, from the evidence presented as to the effect of a nationwide curfew, "that air commerce, by reason of its speed and volume, requires a single authority in control if it is to be conducted at maximum safety and efficient use of the navigable air space."[80]

We have already demonstrated the falsity of the premise on which this conclusion was based. We have further demonstrated the undesirability, if not the impossibility, of applying uniform rules for airports in the area of noise abatement.

Further discussion is therefore unnecessary except to point out that, under at least one decision of this Court, the extent to which commerce requires a single authority in control has been determined to be a *legislative question*, not a judicial question. Thus in *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U.S. 177 (1938) the Court stated (303 U.S. at pages 189-190):

> "Congress, in the exercise of its plenary power to regulate interstate commerce, may determine whether the burdens imposed on it by state regulation, otherwise permissible, are too great, and may, by legislation designed to secure uniformity or in other respects to protect the national interest in the commerce, curtail to some extent the state's regulatory power. *But that is a legislative not a judicial function*, to be performed in the light of the Congressional judgment of what is appro-

[80] A. 368. See also Finding of Fact No. 83 (A. 401) and Conclusion of Law No. 19 (A. 405).

priate regulation of interstate commerce, and the extent to which, in that field, state power and local interests should be required to yield to the national authority and interest. In the absence of such legislation the judicial function, under the commerce clause as well as the Fourteenth Amendment, stops with the inquiry whether the state legislature in adopting regulations such as the present has acted within its province, and whether the means of regulation chosen are reasonably adapted to the end sought." (Italics added.)

Up to the present time Congress has not seen fit to place airports utilized by air commerce under the control of any Federal agency, and, as previously observed, airport proprietors are not subject to Federal economic or other regulation except in the area of airport *safety*.[91]

5. Violation of Fifth, Ninth and Tenth Amendment Rights.

One of the points which Appellants stressed in their argument before the Court of Appeals was that a decision holding Burbank powerless to enact and enforce the ordinance in question would allow private airport proprietors, such as Lockheed, to ride roughshod over the rights of owners of property surrounding airports in violation of constitutional guarantees. This is exactly what has occurred and is occurring since the District Court rendered its decision.

If the activities and conduct of the Federal Aviation Administration and the United States in connection with the Hollywood-Burbank Airport are sufficient to con-

[91]Footnote 9, *supra*.

stitute Federal action,[92] then the Fifth Amendment would apply. An action for damages can hardly be considered a substitute for that portion of the Fifth Amendment which guarantees that no person shall ". . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation." Those who live in the vicinity of Hollywood-Burbank Airport are daily being deprived of a chance to enjoy a life free from constant bombardment by sound waves. Their liberty and the use of their property are severely restricted by the adverse environment imposed on them by a private corporation for private gain and without just compensation having been paid.[93] Surely this is an area in which a municipality or a State may reasonably legislate, as they have in the area of life, liberty or property taken by direct physical force. The Commerce Clause cannot shield those who invade Fifth Amendment rights, and legislation, such as the Burbank ordinance, which seeks in some degree to preserve such rights until due process

---

[92] Approximately 2,050 feet of the northernmost portion of the "North-South" runway and approximately 2,250 feet of the westernmost portion of the "East-West" runway are on land owned by the United States Government (A. 380-381); the FAA has expended approximately $2,000,000 on the installation of navigational aids at Hollywood-Burbank Airport including the Instrument Landing System ("ILS"), runway approach and identification lights, and radar and radio equipment, and operates the Airport Traffic Control Tower and Radar Approach and Departure Control at that airport (A. 385); the FAA has included Hollywood-Burbank Airport in the National Airport Plan [Pl. Ex. 56] in spite of the fact that Congress had specifically directed that such Plan was to embrace airports owned and operated by States and local public agencies (49 U.S.C. §1101, 1102.)

[93] The California Supreme Court has recently recognized that more is involved than the mere "taking" of property, in holding that an action grounded on public nuisance will lie. *Aaron v. City of Santa Monica*, 6 Cal. 3d 920, 101 Cal. Rptr. 568, 496 P. 2d 480 (1972).

is satisfied and just compensation paid, must be upheld if that Amendment is to have any real meaning.

These arguments are not without support in decisions of this Court. In *Bell v. Burson*, 402 U.S. 535 (1971), this Court held that *before* a person's driving privileges could be terminated because of involvement in an accident, the Due Process Clause of the Fourteenth Amendment requires that a hearing be provided for the determination of whether there is a reasonable possibility of a judgment being rendered against him as a result of the accident. In *Sniadach v. Family Finance Corporation*, 395 U.S. 337 (1969), it was likewise held that *before* a person's property could be taken under a prejudgment garnishment, the Due Process Clause of the Fourteenth Amendment required notice and a hearing. To the same effect is *Fuentes v. Shevin*, 407 U.S. 67 (1972). The following excerpts from that opinion are particularly pertinent (407 U.S. at pages 81-82):

> ". . . the prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference."
>
> * * *
>
> "But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. 'This Court has not . . . . embraced the general proposition that a wrong may be done if it can be undone.' [Citation.]
>
> "This is no new principle of constitutional law. The right to a prior hearing has long been recog-

nized by this Court under the Fourteenth and Fifth Amendments. Although the Court has held that due process tolerates variances in the *form* of a hearing 'appropriate to the nature of the case,' [Citation] and 'depending upon the importance of the interests involved and the nature of the subsequent proceedings [if any],' [Citation] the Court has traditionally insisted that, whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes effect."

It is a logical extension of these decisions that *before* a person may be deprived of the use and enjoyment of his property, just compensation must be paid or, at the very least, deposited in court.

We pause to note that there appear to be broader implications when the Fifth Amendment is considered with the Fourth Amendment. Thus in *Olmstead v. United States*, 277 U.S. 438 (1928), it is stated (277 U.S. at page 478):

"The protection guaranteed by the [Fourth and Fifth] Amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."

If the Fifth Amendment is not applicable, there is a respectable body of opinion that the right to a decent environment is one of the rights retained by the people under the Ninth and Tenth Amendments, and that action which leads to the destruction of the environment may be restrained or limited.[84] Apart from this, it would appear to be beyond question that one of the rights retained by the people under the Ninth and Tenth Amendments was the right to restrain private persons and corporations who would seek to interfere with their lives and liberty or take their property without first paying just compensation. Under either of these propositions the Burbank ordinance is such a restraint,

---

[84]Roberts, *An Environmental Lawyer Urges: Plead The Ninth Amendment*, Natural History, 26 (Aug.-Sept. 1970); Redlich, *Are There Certain Rights . . . Retained by the People?* 37 N.Y.U. L.Rev. 786 (1962); Beckman, *The Right to a Decent Environment Under the Ninth Amendment*, 46 Los Angeles Bar Bulletin 415 (Sept. 1971); See also *Griswold v. Connecticut*, 381 U.S. 479 (1965). In *Environmental Defense Fund v. Corps of Engineers*, 325 F. Supp. 728 (1971), which involved an attempt to enjoin the construction of a dam by the United States Army Corps of Engineers, the District judge had this to say regarding the claim for relief under the Fifth and Ninth Amendments (325 F. Supp. at p. 739):

> "Those who would attempt to protect the environment through the courts are striving mightily to carve out a mandate from the existing provisions of our Constitution. Others have proposed amendments to our Constitution for this purpose. See Toward Constitutional Recognition of the Environment, 56 A.B.A.J. 1061 (Nov. 1970). Such claims, even under our present Constitution, are not fanciful and may, indeed, some day, in one way or another, obtain judicial recognition. But, as stated by Judge Learned Hand in Spector Motor Serv., Inc. v. Walsh, 139 F.2d 809 (2 Cir., 1944):
>
> 'Nor is it desirable for a lower court to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant.'
>
> "The Ninth Amendment may well be as important in the development of constitutional law during the remainder of this century as the Fourteenth Amendment has been since the beginning of the century."

having been enacted by a legislative body duly elected by the People of the City of Burbank.

6. Griggs v. Allegheny County.

We have reserved the case of *Griggs v. Allegheny County*, 369 U.S. 84 (1962) for separate discussion because of what we consider to be inconsistencies between the decisions of the District Court and the Court of Appeals and the position taken by this Court in that case. In holding the airport proprietor liable for the "taking" of an air easement over the petitioner's property, and in effect excluding the Federal government and the airlines from any responsibility in that connection, this Court gave no weight to Subdivision (24) of Section 101 (49 U.S.C. §1301) of the Federal Aviation Act of 1958 under which Congress had redefined the "navigable airspace" to "include airspace needed to insure safety in take-off and landing of aircraft," nor to Section 104 (49 U.S.C. §1304) of that Act, *supra*, relied upon by the Court of Appeals. The fact that the CAA had approved the general design of the airport, that Federal funds were used in its construction, that every landing and take-off from the airport was at all times under the direct signal and supervisory control of some Federal agent and that the contribution of the Federal government was a part of its National Airport Plan to induce localities, such as Allegheny County, to assist in setting up a national and international air-transportation system, were likewise accorded no weight. The *Griggs* decision seemingly took the view that airports and airport proprietors were outside of the scope of Federal control and that it is the airport proprietor who makes the necessary determinations as to where the airport should be built, the length

of its runways, and other features which would affect th type and size of the aircraft which may utilize its facilities. We certainly do not dispute the validity of this conclusion, but what we stated before the Court of Appeals has equal validity here, to wit:

> "*Griggs* and the decision of the District Court in this case cannot stand together. If the FAA has the power over airports which it and the Appellees contend it has, then *Griggs* must be overruled. If such should ever occur, there will be at least one good result, namely, the Federal Government and the airlines will no longer be able to avoid liability for the destruction and damage caused by an airport, such as Hollywood-Burbank Airport, which has neither provided nor acquired adequate approachways to its facilities."

We say again that if Congress has in fact preempted the field of regulation of noise created by jet aircraft to the exclusion of States and local governments, as the opinion of the Court of Appeals in this case holds, then the decision in *Griggs* must be reconsidered, something only this Court can do. With power should go responsibility. If the decision in this case is allowed to stand without reversal of *Griggs*, then the Federal Aviation Administration will be able to continue its questionable course of conduct without interference, and the Federal government and the airlines will remain shielded from liability for their actions or non-action.[26]

---

[26] See Lesser, *The Aircraft Noise Problem: Federal Power But Local Liability*, 3 Urban Lawyer 175 (1971). Mr. Lesser,

While we recognize that liability for a "taking" of air or noise easements necessary for the operation of the Hollywood-Burbank Airport is not directly at issue in this case, neither was the liability of the Federal Government or the airlines for such a "taking" directly at issue in the *Griggs* case. Nevertheless, on the strength of the *Griggs* decision, there has been no attempt to our knowledge to impose liability for such a taking on the Federal government except in cases where the Federal government is the owner and operator of the airport. If in fact the Federal government by virtue of legislation or exercise of power has preempted the ability of States and local governments to exercise reasonable control over airports within their boundaries, in terms of aircraft noise abatement, then we feel that the Court should take this opportunity to reverse *Griggs* to the extent indicated. Noise pollution by jet aircraft is too serious a matter to allow for the time it takes a decision to reach this Court, should someone have the time, energy, money and fortitude to weather adverse decisions of the lower Federal courts and finally reach this Court.

---

who was at that time Chief, Opinions and Appeals Division of the Port of New York Authority, has this to say regarding the effect of *Griggs*:

"Because *Griggs* failed to place the financial burden of aircraft noise on either the airlines or the Federal Government, neither had any direct economic inducement to assign to noise suppression the high priority it required in aircraft development—a rank co-equal to that of safety.

"It is hard to escape the conclusion that if Justice Black's dissenting opinion had been the 'Opinion of the Court' the noise problem would not have reached its present dimensions." (*Id.* at p. 202).

7. The Solution.

There are few who would not agree that complete relief from the adverse effects of noise pollution caused by jet aircraft will only come when the noise from jet engines is reduced to liveable levels. As has already been demonstrated to a degree, the prospects of this are indeed remote. It will be our purpose here to review the means and measures available for the solution of this problem, as a fitting introduction to the last phase of this argument in which we contend that if the safety, health and welfare of the People of these United States is to be preserved, States, local governments and the Courts must be released from the strait-jacket of the preemption and conflict doctrines which have been gradually extended in their scope and effect since *Gibbons v. Ogden*, 9 Wheat. 1 (1824). We will attempt to demonstrate the imperative necessity for this Court's reconsideration of these doctrines in light of the situation as it exists in this country today and how it will be in the future if this Court should fail to intervene. There can be no dispute that such a review and reconsideration are well within the issues involved in this case.

Relief at the Federal Level.

Much has already been said regarding the posture and inaction of the Federal Aviation Administration in the area of abatement of jet aircraft noise, and it need not be repeated here. Reference has likewise been made to the apparent impossibility of persuading the Congress to shift the responsibility for the abatement of aircraft noise to another Federal agency less subject to domination by the airlines. While we have the National Environmental Policy Act[66] and the Environment Quality In-

[66] 42 U.S.C. §4321, *et seq.*

provement Act of—1970,[97] these Acts provide no present relief from existing noise jet aircraft pollution. Even with respect to new projects which may have an adverse effect on the environment, it has been necessary for this Court[98] and other courts[99] to compel the Federal agencies concerned to give proper consideration to the environmental impact of proposed actions in accordance with the provisions of the applicable statute.

Although this Court has, even without the benefit of specific legislation by Congress, intervened to protect the environment,[100] there is no indication yet that it will implement the broad policy statements in these Acts by upholding State and local governmental regulations in this field. The California Supreme Court has recently[101] taken the State Legislature at its word and utilized similar broad statements of environmental policy contained in the California Environmental Quality Act of 1970[102] to extend the requirement of an environmental impact report to private projects, even

---

[97] 42 U.S.C. §§4371-4374. In this Act it is declared that "The primary responsibility for implementing this policy rests with State and local governments" (Section 202(b)(2); 42 U.S.C. §4371(b)(2)).

[98] *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

[99] *Calvert Cliffs' Coordinating Committee, Inc. v. Atomic Energy Commission*, 449 F. 2d 1109 (D.C. Cir. 1971). There the Court stated (at p. 1111):

> "Our duty, in short, is to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy."

[100] *New Jersey v. New York*, 283 U.S. 336 (1931); *Udall v. Federal Power Commission*, 387 U.S. 428 (1967).

[101] *Friends of Mammoth v. Board of Supervisors of Mono County*, November 6, 1972, Sacramento 7924. This case has not yet been officially reported.

[102] California Public Resources Code §21000, *et seq.*

though that statute clearly prescribes such a requirement only in cases of projects of a public nature.[103]

Interim Measures.

There can be no question that interim measures, such as the Burbank ordinance, are morally, socially and environmentally necessary. Many other interim measures, locally applied, can be adopted to ease the burden of aircraft noise on those who have the misfortune of having to reside in the vicinity of an airport servicing jet aircraft. These could include a requirement that only new jet aircraft which meet the noise standards adopted by the FAA could use particular airports during the nighttime hours.[104] Similarly nighttime use of an airport as to existing jet aircraft could be restricted to such of these aircraft as have been retrofitted for noise suppression to the extent possible under the present state of the art. Other interim measures which have been adopted or suggested are the following: (1) sound-proofing of homes under the approach and departure paths in the areas of the greatest noise impact[105] and (2) relocating those who reside in such areas to areas further removed. These latter measures could only be accomplished at very substantial cost both in money and in disruption of the lives of those who reside in these areas.

---

[103]California Public Resources Code §21151.

[104]It is reported that Amsterdam's Schiphol Airport, one of Europe's largest, will be virtually closed at night for use by older jets starting Nov. 1 as a noise abatement measure. Among those certified for night operations will be the Boeing 747, Douglas DC-10, Lockheed 1011 and Fokker T-28. Jets built before 1969 will not be certified, officials said, for flights between 11:30 p.m. and 6 a.m.

[105]The Los Angeles International Airport has undertaken a pilot program of sound-proofing selected dwellings in areas subject to the greatest noise impact caused by jet operations at

Injunctive Relief Through the Courts.

As has already been indicated to some extent, there is no present prospect of obtaining injunctive relief through the courts because of the views expressed by the lower courts in this case and in other Federal lower court decisions. The one bright spot is the decision of the New Jersey Superior Court in *Township of Hanover v. Town of Morristown*, 108 N.J. Super. 461, 261 Atl. Rptr. 2d 692 (1960), which imposed a curfew on jet operations at the Morristown Airport. However, it is reported that the Federal Aviation Administration is seeking a Federal court injunction to enjoin the enforcement of this curfew on the ground that it violates the Supremacy Clause of the United States Constitution,[108] and if the present pattern is followed, it will be successful. Even the California Supreme Court has been unwilling to use its injunctive powers to interfere with the flight paths of certificated air carriers using the San Diego Airport, although there are suggestions in the opinion that if the airport proprietor had been a party, it might have done something about the resulting noise pollution.[109]

Reversal of Griggs v. Allegheny County.

A reversal of *Griggs v. Allegheny County*[108] to the extent of additionally imposing liability for the taking of air or noise easements on the Federal government and the airlines would no doubt serve to dramatically stimulate the Federal Aviation Administration and

---

airport. See Berger, *Nobody Loves An Airport*, 43 So.Cal. L.R. 631 at p. 748.

[108] See *Aviation Week & Space Technology*, November 6, 1972, at p. 19.

[109] *Loma Portal Civic Club v. American Airlines, Inc.*, 61 Cal. 2d 582, 39 Cal.Rptr. 708, 394 P.2d 548 (1964).

[108] 369 U.S. 84 (1962).

the airlines into taking more appropriate action in the areas of jet aircraft noise abatement. This, however, would not necessarily be an unmixed blessing in view of *Batten v. United States.*[109] Unless this latter decision were also overruled, State courts would remain the preferred forum for this type of litigation because damages for a lateral taking are generally permitted.[110] Furthermore, although there is an enormous amount of litigation pending in which damages are sought for the taking of air or noise easements,[111] such litigation is painfully slow and in the end probably serves for the most part to benefit the attorneys involved. As was observed in the New Jersey case referred to above,[112] damages are not an adequate remedy for those whose lives and property are so severely affected by noise pollution caused by jet aircraft.[113] Not everyone living

---

[109]306 F. 2d 580 (1962) *cert. denied*, 371 U.S. 955 (1963), *rehearing denied*, 372 U.S. 925 (1963).

[110]*Martin v. Port of Seattle*, 64 Wash. 2d 309, 391 P. 2d 540 (1964), *cert. denied*, 379 U.S. 989 (1965); *Thornburg v. Port of Portland*, 233 Ore. 178, 376 P. 2d 100 (1962); *Thornburg v. Port of Portland*, 244 Ore. 69, 415 P. 2d 750 (1966); *Aaron v. City of Los Angeles*, 11 Avi. 17, 642 (Cal. Super. Ct. 1970).

[111]It is reported (Burbank Daily Review, October 12, 1972) that over $14 billion worth of lawsuits are pending against the Los Angeles International Airport because of noise pollution created by that facility. The number and amount of such lawsuits is likely to increase because of the recent decision of the California Supreme Court in *Nestle*, footnote 93, *supra*.

[112]*Township of Hanover v. Town of Morristown*, 108 N.J. Super. 461, 261 Atl. Rptr. 2d 692 (1969).

[113]In *Nestle v. City of Santa Monica*, 6 Cal. 3d 920, 101 Cal. Rptr. 568, 496 P. 2d 480 (1972), the plaintiffs were unable to establish that the value of their property had been decreased by noise pollution resulting from the operations at the Santa Monica Airport. It was no doubt for this reason that the California Supreme Court determined that an action for public nuisance would lie so that those who bear the impact of the noise pollution would have some remedy in terms of its effect on their health and use of their property.

in the vicinity of an airport owns the property on which he resides. It probably matters little to the landlord what the effect of such noise pollution may be on his tenants, since he would be looking ahead to the time when rezoning to commercial or industrial use would enable him to achieve a handsome profit. The remedy of damages serves no useful purpose to a senior citizen who has with considerable agony observed the proliferation and increase in jet aircraft noise. The value of his property has either remained static or decreased in spite of the inflationary trend. It would do him little good to seek damages since even if he were completely successful, and after payment of the fees of his attorney, he would be unable to duplicate what he presently possesses in another area. Other property owners would be similarly affected.

The Preemption and Conflict Doctrines.

The preemption and conflict doctrines of this Court mark out a sufficient area in which interim measures, such as the Burbank ordinance, can fit without violation of the Supremacy Clause of the United States Constitution, where, as here, Congress has not clearly indicated an intent to preempt the area of jet aircraft noise abatement. Any thoughts that Congress may have in this direction is tempered by the knowledge that if it does so, it will eliminate the shield from liability provided by *Griggs v. Allegheny County*.[114] Should *Griggs* be reversed to the extent indicated, then this obstacle would be removed, but more importantly, should this Court sustain the Burbank ordinance, there is no doubt that the airlines and the Federal Aviation Administration would then prevail upon Congress to declare a

[114] U.S. 84 (1962).

preemption of this field. To support this assertion requires nothing more than a reference to this Court's decision in *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*[115] The ink was hardly dry on that opinion when the airlines and the Federal Aviation Administration prevailed upon selected Congressmen to introduce legislation nullifying the Court's decision.[116] This legislation was passed by both Houses of Congress and immediately sent to the President. Fortunately for those airports who had begun to rely and plan for the future on the basis of the per capita taxes validated by that decision, the preemptive legislation was included with appropriations for airports, and it was for this latter reason that the President vetoed the measure.[117]

Another example of the effectiveness of the airlines in overcoming State legislation is found in their ability to secure passage by Congress of legislation referred to as the Clean Air Amendments of 1970.[118] One of the principal features of this legislation was a section which prohibited any State or political subdivision from adopting or attempting to enforce any standard respecting emissions of any air pollutant from any aircraft or engine thereof unless such standard was identical with the Federal standard.[119] The stimulus and reason for their sudden activity was to forestall the necessity of their compliance with California air pollution standards

---

[115]405 U.S. 707 (1972).

[116]Senate Bill 3755, 92nd Cong. 2d Sess.

[117]See *Aviation Week & Space Technology*, Nov. 6, 1972 at p. 27.

[118]Clean Air Amendments of 1970, P.L. No. 91-604 (December 31, 1970).

[119]See 42 U.S.C. §1857f-11.

applicable to jet aircraft which were shortly to become effective.

A subsequent declaration by Congress of preemption of the area of jet aircraft noise abatement would, under the existing preemption and conflict doctrines of this Court, nullify a favorable decision in this case, and would deprive States and local governments of any means to protect their citizens from the adverse effects of jet aircraft noise pollution.

In view of this we feel it imperative that the Court take this opportunity to reexamine and reconsider the preemption and conflict doctrines which have grown up over the years. It is to be hoped that after such a reconsideration, the Court will find and determine that there are areas, such as this and other areas affecting the health, safety and welfare of the citizens of the United States, in which State, local governmental or Court action cannot be precluded, notwithstanding a Congressional declaration of preemption of the particular field.

It is noted that there is some trend in the later decisions of the Court in that direction. This Court has uniformly recognized the legitimate interests of States and local governments in enacting legislation designed to protect the health, safety and welfare of its citizens and has been most reluctant to find Federal preemption in such cases,[120] in contrast to other cases involving other types of regulation.[121] This has not al-

---

[120] *Brotherhood of Locomotive Engineers v. Chicago, Rock Island & Pacific Railroad Co.*, 382 U.S. 423 (1966); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960); *Terminal Railroad Ass'n of St. Louis v. Brotherhood of Railroad Trainmen*, 318 U.S. 1 (1943).

[121] *Local 24 International Brotherhood of Teamsters v. Oliver*, 358 U.S. 283, 297, (1959); *California v. Taylor*, 353 U.S. 553 (1957).

ways been so. In the earlier case of *Napier v. Atlantic Coast Line Railroad Co.*, 272 U.S. 605 (1926), which involved the ability of States to prescribe automatic fire doors on railroad engine fire boxes and engine cab curtains, regulations admittedly designed to protect the health, safety and welfare of those involved in their operation, this Court flatly declared that the States involved could not do so because of Federal preemption. There is some language in that opinion out of harmony with the opinions in *Colorado Anti-Discrimination Com.*[122] and *Head.*[123] A later decision of this Court, *Terminal Railroad Association v. Brotherhood of Railroad Trainmen*, 318 U.S. 1 (1942), appears to have ignored *Napier*, even though it was cited in the briefs, and sustained a regulation of the Illinois Commerce Commission which required cabooses on trains operated in interstate commerce to protect the health, safety and welfare of those involved in their operation. In *Huron*,[124] although *Napier* was cited in the majority opinion,[125] it was chiefly relied upon by the dissent as support for the view that the Detroit air pollution ordinance had been preempted.[126] Notwithstanding this trend, the Court has continued to at least state the rule that if Congress has clearly expressed its intent to occupy a particular field, State or local regulation in that field will not be permitted.

---

[122]372 U.S. 714 (1963).

[123]374 U.S. 424 (1963). In this case and in *Colorado Anti-Discrimination Com.*, footnote 122, *supra.*, this court held that where any power of the Federal agency involved remains "dormant and unexercised", State regulation in the area in which that power could be exercised is not preempted. *Napier* seems to be in disagreement (see 272 U.S. 605 at p. 613).

[124]362 U.S. 440 (1960).

[125]362 U.S. at p. 443.

[126]362 U.S. at pp. 452-453.

However, there are some recent expressions of Justices of this Court which indicate some disenchantment with this rule. Thus in *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969), it is stated in the dissenting opinion as follows (394 U.S. at pages 397-398):

"Congress in adopting a federal regulation can make it exclusive of all state regulation, in which event one may not be required 'by a State to do more or additional things or conform to added regulations, even though they in no way conflicted with what was demanded of him under the Federal Act.' Rice v. Santa Fe Elevator Corp. 331 US 218, 236, 91 L Ed 1447, 1462, 67 S Ct 1146. And see Campbell v. Hussey, 368 US 297, 300-301, 7 L Ed 2d 299, 301-302, 82 S Ct 327. But that principle, although uniformly recognized, has provoked much dissent in its application, as the dissents in the Rice and Campbell cases illustrate.

"As Mr. Justice Brandeis said in Napier v. Atlantic Coast Line, 272 US 605, 611, 71 L Ed 432, 438, 47 S Ct 207, 'The intention of Congress to exclude States from exerting their police power must be clearly manifested.' And the Court, mindful of the force of the Tenth Amendment and the place of the States in our constitutional system, has resolved close cases in favor of a continuing power on the part of the States to legislate in their customary fields and thus has permitted state regulations to mesh with federal controls. See Federal Compress Co. v. McLean, 291 US 17, 78 L Ed 622, 54 S Ct 267; Townsend v. Yeomans, 301 US 441, 454, 81 L Ed 1210, 1220, 57

S Ct 842; Penn Dairies v. Milk Control Commission, 318 US 261, 87 L Ed 748, 63 S Ct 617.

"Even here, there have been dissents when it came to particular applications of the principle to the facts of a case."

Some judges of the lower Federal courts have indicated a similar reluctance in applying such an all-inclusive doctrine in areas where health, safety and welfare are involved. An example of this is found in the dissenting opinion in *Northern States Power Company v. State of Minnesota*, 447 F. 2d 1143 (1971), a case which is presently before this Court for review. While the dissent in that case recognizes the existence of the preemption and conflict doctrines which would preclude a State or local regulation if Congress so declares, the opinion suggests a doctrine which would be more in keeping with the situation as we presently find it in this country, and could well be a doctrine which must be adopted if the legitimate interests of States and local governments and their citizens are to be protected against the continuing encroachment of Federal power. It is there stated (447 F. 2d at pages 1157-1158):

"The majority opinion also observes that states might adopt overprotective environmental control regulations which would go the extent of stultifying the industrial development and use of atomic energy. I agree that such a possibility exists. However, in our present case the trial court decided the case on the basis of absolute preemption as a matter of law and refused to permit testimony on *the reasonableness of the state regulations or the balancing of environmental protection against the desired development of the use of atomic energy.*

The court made no findings upon such issue. The issue of the reasonableness of the state regulations and of whether they were so burdensome as to frustrate the development of atomic energy is not properly before us." (Italics added.)

That the need for a rule of reasonableness and necessity in environmental matters and other matters affecting public health, safety and welfare, in place of existing preemption and conflict doctrines, becomes more apparent as the Federal bureaucracy continues to expand and insert itself into matters both public and private. What we are faced with today could not have been envisioned by the framers of the United States Constitution. There was necessity then to protect the Federal government from those who would have preferred to continue under the Articles of Confederation. But the situation has changed. Now the States and local governments need protection from the continuing erosion of their powers by the Federal government. What is not being achieved directly under Federal legislation is being achieved indirectly by applying conditions to Federal grants such as those authorized under the Airport and Airways Development and Revenue Acts of 1970.[127]

A more insidious trend is noted in recent Federal legislation. In the Air Quality Act of 1967,[128] Congress has delegated to the Administrator of the Environmental Protection Agency *veto power* over State air pollution regulations pertaining to motor vehicles.[129] The ultimate intrusion was achieved in the Noise Control Act

---

[127] 49 U.S.C. §1701, *et seq.*
[128] 42 U.S.C. §1857, *et seq.*
[129] 42 U.S.C. §1857f-6a(b).

of 1972, just recently enacted.[180] Although it is not entirely clear, it would appear that no State or political subdivision can establish and enforce standards or controls on environmental noise emitted by railroad equipment or facilities and motor carriers, or control their use, operation or movement, unless first *approved* by the Administrator.[181] So we now have the legitimate exercise of the police powers of States and local governments in those areas subject to the whim or caprice of whoever may be occupying the position of Administrator in that Federal agency, or his subordinates.

The quality of our environment has deteriorated to such an extent that the freedom to live in an atmosphere of peace and quiet has been severely restricted. The "domestic tranquility" which the framers of the Constitution sought to promote is no longer with us, not only in the area of noise but also in other areas of citizen need.

The primary reason for this is that Congress has by and large ceased to be responsive to the will of the people. To a large degree needed legislation is under the control of committees of the House and Senate. Individual members of Congress can, by delaying tactics and other means, frustrate the passage of necessary legislation. Special interest groups, such as the airlines, appear to have an unusual ability to block legislation in the area of concern to them.

We, therefore, respectfully urge this Court to re-examine the preemption and conflict doctrines as pre-

---

[180]House of Representatives Bill No. 11021, 92nd Cong. 2d Sess.; 118 Cong. Rec. (daily ed. Oct. 18, 1972) No. 169, at pp. S 18638-S 18643.

[181]See Section 17(c)(2) and Section 18(c)(2), Noise Control Act of 1972, footnote 130, *supra*.

ently enunciated and take upon itself the burden of defining those areas in which States and local governments may properly exercise their police powers, and the Courts may act, notwithstanding a declaration of Federal preemption. It is suggested that a proper rule would be that such State and local governmental enactments, and Court applied restraints, would be valid, provided it is demonstrated that the enactment or restraint in question is reasonable and necessary under the circumstances. Such a rule would find adequate support under the Ninth and Tenth Amendments.

CONCLUSION.

By reason of the foregoing, it is respectfully submitted that the decisions of the Court of Appeals and the District Court in this case should be reversed and the injunction issued by the District Court dissolved.

SAMUEL GORLICK,
City Attorney,

RICHARD L. SIEG, JR.,
Assistant City Attorney,
Counsel for All Appellants
Except Samuel Gorlick,

RICHARD L. SIEG, JR.
Counsel for Appellant
Samuel Gorlick.